THE ABSENCE OF A SYSTEM OF INTERNAL CONTROLS IN SOUTH AFRICAN ADMINISTRATIVE LAW, IN LIGHT OF SECTION 7(2) OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

Thesis presented in fulfilment of the requirements for the degree of Master of Laws at Stellenbosch University

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Declaration:

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Ernst Heydenrych
December 2020

"*Everyone is affected daily by administrative intervention, not merely in an abstract or philosophical sense but as a matter of practical (and often painful) fact...*"

Cora Hoexter,

The Future of Judicial Review in South African Administrative Law, 2000

Summary:

Section 33 of the Constitution envisions a lawful, reasonable and procedurally fair manner of obtaining administrative justice. Coupled with the project of Transformative Constitutionalism, which seeks to create a culture of justification, the hope was that South Africa's public administration would become more open, accountable and efficient.

The primary mechanism through which the above occurs, is judicial review. However, its time-consuming and costly nature means that a large portion of South African society cannot gain access to the court system. Furthermore, courts have often held that the public administration is better suited to deal with certain matters, as courts may lack the necessary expertise to address a particular administrative matter adequately. Thus, there is a need to find alternative methods for holding the public administration accountable.

One such method, is by way of the exhaustion of internal remedies. Section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 holds that an applicant for judicial review must first exhaust any and all available internal remedies before approaching a review court. Should the applicant fail to do so, the court is obliged to direct said applicant to first exhaust the available internal remedies (section 7(2)(b)), unless the court grants an exemption (section 7(2)(c)).

However, members of the public have no general right to an internal remedy, nor is there a duty on the state to provide an aggrieved party with one.

South African administrative law currently lacks a uniform system of internal controls (remedies), and whether or not an aggrieved party will have an internal remedy to exhaust, will depend on the context of each case.

Accordingly, this thesis argues in favour of the creation and implementation of a uniform system of internal controls by the state, by relying on four main points: (a) section 33 of the Constitution; (b) the project of Transformative Constitutionalism; (c) the impact of poverty on the attainment of administrative justice; and (d) the duty to exhaust domestic remedies under international law.

Should the above argument be accepted, then focus must shift to the content and scope of an effective internal remedy. By way of analysis of various statutory frameworks containing existing internal remedies, nine criteria are identified, which

should inform the decision-making of the state when formulating the content and scope of an effective internal remedy.

Opsomming:

Artikel 33 van die Grondwet poog om te verseker dat administratiewe geregtigheid geskied op ‘n wyse wat regmatig, redelik en prosedureel bilik is. Tesame met die projek van Transformatiewe Grondwetlikheid wat ‘n kultuur van regverdiging tot stand wil bring, was die hoop dat die publieke administrasie meer toeganklik, aanspreeklik en doeltreffend sou funksioneer.

Die primêre meganisme om die bogenoemde te bereik, is geregtelike hersiening. Tog, die tyd- en duursame wyse daarvan beteken dat ‘n groot deel van die Suid-Afrikaanse publiek sukkel om toegang tot die regsisteem te kry. Verder het howe ook reeds bevind dat die publieke administrasie meer geskik is om sekere probleme op te los, aangesien howe soms nie die nodige kennis het om sekere administratiewe kwessies suksesvol op te los nie. Alternatiewe metodes moet dus gevind word om die publieke administrasie verantwoordelik te hou.

Een so metode is by wyse van die uitputting van interne remedies. Artikel 7(2)(a) van die *Promotion of Administrative Justice Act* 3 van 2000 vereis dat ‘n applikant vir geregtelike hersiening eers beskikbare interne remedies moet uitput voor die hof genader word. Sou die applikant dit nie doen nie, moet die hof weier om die saak aan te hoor todat relevante interne remedies uitgeput is (artikel 7(2)(b)), tensy die hof ‘n uitsondering toestaan (artikel 7(2)(c)).

Ten spyte van die bogenoemde, het die publiek steeds geen algemene reg tot ‘n interne remedie nie, en daar is ook geen plig op die staat om ‘n gegriefde party met een te verskaf nie.

Die Suid-Afrikaanse administratiefreg het tans geen uniforme sisteem van interne kontrole (remedies) nie. Dit beteken dat die beskikbaarheid van interne remedies streng sal afhang van die konteks van elke saak.

Gevolglik is hierdie tesis ten gunste van die skepping en implementering van ‘n uniforme sisteem van interne kontrole deur die staat, en steun op vier hoof argumente daarvoor: (a) artikel 33 van die Grondwet; (b) die projek van Transformatiewe Grondwetlikheid; (c) die impak van armoede op administratiewe geregtelikheid; en (d) die plig onder internasionale reg om binnelandse remedies uit te put.

Sou die bogenoemde argument aanvaar word, moet fokus skuif na die inhoud en omvang van ‘n effektiewe interne remedie. By wyse van ‘n analise van ‘n aantal statutêre raamwerke wat bestaande interne remedies bevat, word nege kriteria

geïdentifiseer waarop die staat kan steun wanneer die inhoud en omvang van ‘n effektiewe interne remedie bepaal word.

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Abbreviations:

Constitution	Constitution of the Republic of South Africa, 1996.
Interim Constitution	Interim Constitution of the Republic of South Africa, Act 200 of 1993.
PAJA	Promotion of Administrative Justice Act 3 of 2000.
PSA	Public Service Act, 1994.
WPTPS	White Paper on the Transformation of the Public Service.

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1 Introduction

1 1 Administrative justice

1 1 1 General

The enactment of the Interim Constitution of the Republic of South Africa, Act 200 of 1993 ("Interim Constitution"), ushered in the commencement of a new constitutional dispensation in South Africa.[1] The Apartheid system of government, premised on parliamentary sovereignty,[2] was replaced with a system based on constitutional supremacy and the rule of law.[3] This shift was described by the Constitutional Court as "a legal watershed",[4] and had a significant impact on South African law, including the public law of which administrative law forms part.

Section 33(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution") provides that "everyone has the right to [just] administrative action that is lawful, reasonable and procedurally fair". Administrative law (and specifically administrative justice) can no longer simply be regarded as a common law tradition.[5] It has been elevated to a constitutional guarantee.[6] The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was enacted, in line with section 33(3) of the Constitution, to give effect to the right to administrative justice.

However, in order for PAJA to give effect to the constitutional right to administrative justice, an applicant must show that they were affected by an "administrative action"[7] as defined in section 1(*i*) of PAJA.[8] This concept serves a "gateway" function, in order to ensure that a reviewing body, such as a court or tribunal, does not become overburdened with countless review matters.[9] It serves to "balance accountability with efficiency".[10]

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[1] S4(1) of the Interim Constitution: "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency".
[2] Y Burns & R Henrico *Administrative law* 5 ed (2020) 136; Chapter 2 will provide an in depth discussion on the common law tradition of administrative law.
[3] S4 of the Interim Constitution.
[4] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 45.
[5] K Jordaan *Monetary Relief for Breaches of Administrative Justice: Common Law, The Constitution and PAJA* LLM thesis proposal, Stellenbosch University (2017) 4.
[6] 4.
[7] H Corder "The development of administrative law in South Africa" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 1 19.
[8] 19.
[9] 19.
[10] 19.

1 1 2 Branches capable of performing administrative action

The principle of separation of powers, although not expressly mentioned in the Constitution, forms an integral part of the new constitutional dispensation.[11] Each branch, namely: the "policy branch",[12] the public administration,[13] the legislature[14] and the judiciary,[15] are capable of performing administrative actions.[16]

1 1 3 Public administration

This thesis is primarily concerned with the public administration. The public administration, although there is no set definition, consists of all organs of state,[17] excluding the cabinet.[18] It is "that part of the executive concerned with the implementation of legislation and policy".[19] The Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*,[20] considered the type of public administration envisioned for a new democratic South Africa, and the reason for infusing the administration with a number of constitutional values, principles and duties.[21] In this regard, the Constitution devotes a chapter to the public administration, emphasising its important role.[22]

Specifically, the Constitution determines that the above-mentioned values and principles include:

> "[t]he promotion and maintenance of a high standard of professional ethics (s 195(1)(a)), the promotion of the efficient, economic and effective use of resources (s 195(1)(b)), the

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[11] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 113; *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) paras 21 & 22.
[12] *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE)(Section 21) Inc* 2008 2 SA 1 (CC) paras 18, 21 & 24.
[13] *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C) para 21.
[14] *De Lille and Another v Speaker of the National Assembly* 1998 3 SA 430 (C) 452I-453B.
[15] *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 141.
[16] G Quinot & P Maree "Administrative action" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 65 67-69.
[17] Defined in s239 of the Constitution.
[18] MP Ferreira-Snyman "Demokrasie en die openbare administrasie" (2005) 45 *Tydskrif vir Geesteswetenskappe* 79 80.
[19] P Maree "Administrative authorities in legal context" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 28 30.
[20] 2000 1 SA 1 (CC).
[21] Para 133: "Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public…".
[22] Ss 195-197 (Chapter 10).

provision of services in an impartial, fair, equitable and unbiased manner (s 195(1)(d)), the accountable conduct of public administration (s 195(1)(f)) and the fostering of transparency through the provision to the public of timely, accessible and accurate information (s 195(1)(g))".[23]

Section 195(3) further requires that national legislation be enacted to give effect to the values and principles in section 195(1).

To ensure the realisation of the above, the *White Paper on the Transformation of the Public Service* ("*WPTPS*"),[24] called for the establishment of a policy framework to guide the implementation of statute and policy.[25] The purpose of the *WPTPS* was to initiate the transformation of the public service, to create "a public service that is representative, coherent, transparent, efficient, effective, accountable and responsive to the needs of all".[26] The adoption of the *WPTPS* in 1997 therefore resulted in the policy of *Batho Pele*, meaning "putting people first".[27] *Batho Pele* must ensure, amongst others, the accountability of the public administration to the public as a whole.

The eventual focus of this thesis, being internal remedies, will result in continual emphasis of the principle of accountability.

1 2 Regulation of administrative power

Administrative law regulates administrative action.[28] It determines the validity of an action, indicating whether an affected party should seek redress or not, as well as the scope and the manner of the administrator's powers.[29]

As mentioned above, the rules of administrative justice are based on lawfulness, reasonableness and procedural fairness. PAJA gives effect to these rights guaranteed under section 33 of the Constitution, and provides a number of grounds of review on which an applicant must rely when challenging administrative action.[30] These review

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[23] S195(1) of the Constitution; C Plasket "The Exhaustion of Internal Remedies and s7(2) of the Promotion of Administrative Justice Act 3 of 2000" (2002) 119 *SALJ* 50 53.
[24] GN R 1459 of *GG* 18340 of 01-10-1997.
[25] TI Nzimakwe & Z Mpehle "Key factors in the successful implementation of *Batho Pele* principles" (2012) 7 *J. Public Adm.* 279 280.
[26] 280.
[27] 281; See also: Anonymous "Public Service Integrity Management Framework" (2013) *Department of Public Service and Administration* <http://www.dpsa.gov.za/dpsa2g/documents/misc/Integrity%20Management%20Framework.pdf> (accessed 12-02-2019).
[28] G Quinot "Regulating administrative action" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 95 96.
[29] 96.
[30] See s6 of PAJA for a comprehensive list of these grounds of review. See also: Burns & Henrico *Administrative law* chapter 14 for a general discussion of s6 and the grounds of review.

grounds are specifically important in relation to judicial review, the first regulatory mechanism through which administrative action can be challenged.[31]

Further regulatory mechanisms through which administrative action may be challenged include: (a) legislative oversight, a mechanism which precedes all other forms of regulation, as administrative action primarily originates from legislative provisions;[32] (b) mechanisms internal to the administration, allowing the administration to "correct their own mistakes";[33] and lastly; (c) specialised oversight bodies that include, amongst others, the Public Protector[34] and the Public Service Commission.[35]

1 3 Judicial review

1 3 1 General

In spite of the diverse regulatory mechanisms, only judicial review shall be examined in this thesis. Judicial review, as developed under the common law, remains the most important form of control over the powers, organisation and actions of the public administration.[36] Under the common law, the High Court was said to have an inherent power to review administrative action judicially.[37] This was based on the doctrine of *ultra vires*, which encompasses:

> "the responsibility of the courts to interpret and apply legislation so as to ensure that those to whom parliament has delegated powers do not exceed or abuse them."[38]

With the advent of democracy in 1994, judicial review was subjected to dramatic change.[39] Section 24 of the Interim Constitution and section 33 of the Constitution, meant that South Africa's written Constitution became, for the first time, the source "of

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[31] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 96.
[32] 97.
[33] 100.
[34] See chapter 9 of the Constitution.
[35] See chapter 10 of the Constitution.
[36] M Wiechers *Administratiefreg* 2 ed (1984) 292; Quinot "Regulating administrative action" in *Administrative justice in South Africa* 109.
[37] This was authoritatively established in: *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 115: "Whenever a public has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court"; See also *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642.
[38] A Breitenbach "The place of the common law in 'constitutional' administrative law" in H Corder & L Van Der Vijver (eds) *Administrative Justice* (2002) 37 37.
[39] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 110.

both the courts' power of judicial review and of the rules of administrative law."[40] Nonetheless, with PAJA, the High Court remained the court of first instance for judicial review,[41] until 2019. On 19 September 2019, the Minister of Justice and Correctional Services identified a number of Magistrate's Courts who will, in addition to the High Court, have jurisdiction over the review of administrative action.[42] This will be discussed in chapter 3.

The most important characteristic of judicial review is that it should not be confused with appeals. In line with the principle of separation of powers, the judiciary "'reviews' the procedural regularity of the exercise of public power and does not hear 'appeals'".[43] "Substantive decision-making on the facts or the merits"[44] falls to the executive branch of government, and not to the judiciary.[45] It is the duty of judges to review whether the executive, and more specifically, the public administration had remained within the limits of the authority granted to them when reaching a decision or exercising a discretion.

In order for an aggrieved party to approach a court for judicial review, they must comply with a number of procedural requirements,[46] of which two require emphasis, namely: (a) the duty to exhaust internal remedies, and (b) launching the application for judicial review "without unreasonable delay and within 180 days". The duty to exhaust internal remedies shall be the primary focus of this thesis.

1 3 2 Exhaustion of internal remedies under PAJA

Internal remedies (or control) are distinct from the control exercised by civil courts.[47] It concerns an appeal, or other forms of control, internal to the administration

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[40] Breitenbach "The place of the common law in 'constitutional' administrative law" in *Administrative Justice* 39; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 33.

[41] S7(4) of PAJA provides that: "[u]ntil the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction".

[42] GN R1216 in *GG* 42717 of 19-09-2019.

[43] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 13.

[44] 13.

[45] 13.

[46] The procedural requirements include: (a) the jurisdictional questions of the forum to be approached; (b) statutory time limits; (c) exhaustion of internal control measures; (d) showing legal standing to bring the action; (e) application proceedings; (f) burden of proof; and (g) oral evidence. For further information see: Burns & Henrico *Administrative law* chapter 24.

[47] Burns & Henrico *Administrative law* 602.

concerned.[48] There is a distinct relationship between judicial review and internal remedies.[49] An aggrieved party is not permitted to approach a court for judicial review, before all internal remedies have been exhausted.[50] This duty is encapsulated in section 7(2) of PAJA.[51] The purpose of this provision is to "advance an integrated system of regulation of administrative action".[52] The administration should as far as possible be equipped with the tools to rectify its own mistakes.[53]

Under the common law, there was no absolute duty to first exhaust an internal remedy before approaching a court for review.[54] However, with the enactment of section 7(2)(a) of PAJA, courts have been at pains to stress that internal remedies must first be exhausted, unless exceptional circumstances can be shown.[55] Thus, section 7(2) made far-reaching changes to the common law. Firstly, there is now a "positive and unequivocal obligation"[56] to exhaust internal remedies, irrespective of the circumstances. Secondly, it bars a court from reviewing administrative action until internal remedies have been exhausted (unless an exemption is granted).[57] Lastly, for an exemption to be granted, the applicant bears the onus of showing exceptional circumstances why he or she should not be required to first exhaust an available internal remedy.[58]

In light of this, it is clear that this duty is strictly enforced. It places renewed pressure on an aggrieved party to first approach the public administration, utilising its

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[48] 602.
[49] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[50] Burns & Henrico *Administrative law* 603.
[51] "7. Procedure for judicial review –
(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice".
[52] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[53] *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* 2010 4 SA 327 (CC) para 36.
[54] Para 34; J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 466; Burns & Henrico *Administrative law* 602-603.
[55] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Formerly Tropical Paradise 427 (Pty) Ltd* 2010 3 All SA 577 (SCA) para 19; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* 2014 5 SA 138 (CC) paras 127-133; *Nichol v Registrar of Pension Funds* 2008 1 SA 383 (SCA) para 15.
[56] Plasket (2002) *SALJ* 52; Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[57] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[58] 115.

procedures, before approaching the court. This thesis adopts the view that this is a positive development, seeing that internal remedies are usually more informal than judicial proceedings.[59] It is also more affordable, which is important in a country where more than 50% of the population lives below the poverty line,[60] and "can address a wider range of issues regarding administrative action."[61]

Nonetheless, there is no uniform system of internal controls in South Africa.[62] A party affected by an administrative action has no right to an internal remedy, and there is no obligation on a particular part of the public administration to have internal remedies in place.[63] The creation of a "more coherent and uniform system of internal remedies"[64] was considered during the drafting process of PAJA.[65] However, this was left to the discretion of the Minister of Justice, who was afforded the discretion in terms of PAJA, to appoint an advisory council who could advise on "any improvements that might be made in respect of internal complaints procedures".[66] To date, no steps to this effect have been taken.[67] Therefore, whether an aggrieved party will have an internal remedy to exhaust depends on the "particular legislative framework in terms of which the administrative action"[68] was taken.

Arguably this creates a lacuna in South African law, which is the first element to be investigated by this thesis.

1 3 3 The content of internal remedies under PAJA

It must further be noted that, even if one accepts that an internal remedy must first be exhausted, whether an internal remedy actually exists is a far more complicated question. Section 7(2) only applies to particular types of internal remedies. Firstly, it must be a remedy found in statute or in regulations,[69] and it must be internal to the specific administration concerned.[70] Secondly, the internal remedy must be available

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[59] 102.
[60] L Chutel "Post-apartheid South Africa is failing the very people it liberated" (25-08-2017) *Quartz Africa* <https://qz.com/africa/1061461/post-apartheid-south-africa-is-failing-the-very-people-it-liberated/> (accessed 09-02-2019); Anonymous "Poverty on the rise in South Africa" (22-08-2017) *StatsSA* <http://www.statssa.gov.za/?p=10334> (accessed 09-02-2019).
[61] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 102.
[62] 100.
[63] 100.
[64] 101.
[65] 101.
[66] S10(2)(a)(ii) of PAJA.
[67] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 101.
[68] 100.
[69] *Road Accident Fund v Duma and Three Similar Cases* 2013 6 SA 9 (SCA) para 25.
[70] *Reed v Master of the High Court of SA* 2005 2 All SA 429 (E) para 25.

and effective,[71] which implies that it should be capable of providing appropriate relief, akin to that of judicial review.[72] Section 7(2) only comes into play if these conditions are met.

In trying to determine whether a particular remedy satisfies the above criteria, courts have often arrived at different conclusions.[73] Therefore, the second element of this thesis will be to determine the content, requirements and scope of an effective internal remedy.

There is a variety of internal remedies to be found in South African legislation. It would be beyond the scope of this thesis to review each of these mechanisms. However, in order to identify the criteria of an effective internal remedy, focus shall be on local government legislation,[74] as well as internal remedies in the immigration, social welfare and school fee context.

2 Research question

The overarching research question of this thesis is the extent to which, in light of Transformative Constitutionalism[75] and the *Batho Pele* principles, there should be a general and enforceable duty on the state, to create mechanisms that qualify as internal remedies, under section 7(2) of PAJA. This question entails two elements: firstly, one must establish the fundamental basis for the existence of such a duty, and secondly, the content and scope of an internal remedy complying with such a duty, must be determined.

3 Rationale

3 1 Transformative Constitutionalism

It was mentioned above[76] that the Interim Constitution, and its successor, the Constitution, signalled a decisive break with South Africa's Apartheid past. The post-1994 dispensation is a constitutional one, premised on human dignity, equality and freedom.[77] As part of the new constitutional vision, much has been written on the issue

[71] *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* 2010 4 SA 327 (CC) para 44.
[72] *Reed v Master of the High Court of SA* 2005 2 All SA 429 (E) paras 20-25; *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* 2010 4 SA 327 (CC) para 44.
[73] See the discussion immediately succeeding this point.
[74] Local government is the arm of government with which the public come into contact with most often. See: heading 3 in chapter 5.
[75] Defined in: K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150; see discussion in the rationale below.
[76] See footnote 1.
[77] S1(a) of the Constitution.

of Transformative Constitutionalism. Karl Klare defines Transformative Constitutionalism as a:

> "long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[78]

In conjunction with Klare, former Chief Justice Pius Langa wrote that Transformative Constitutionalism includes "the pursuit of some form of economic transformation and a change in legal culture."[79] Transformation, he argues, is an ongoing process which recognises that there is value in that ever-present process itself.[80] It envisions a "meaningful improvement of the material conditions of people's lives together with real change in legal culture."[81]

The Constitution envisages four features of transformation, namely: (a) the realisation of substantive equality; (b) the achievement of social justice; (c) the introduction and implementation of human rights standards; and (d) the "promotion of a culture of justification in public-law interactions."[82] The last-mentioned feature is especially relevant to this thesis, due to the public administration involving administrative actions, which amount to public-law interactions.[83]

As mentioned above, the public administration is governed by section 195(1) of the Constitution, as well as the *Batho Pele* principles.[84] These principles, in conjunction with the project of Transformative Constitutionalism, seeks to build a public administration that is efficient, accountable and transparent.

3 2 Lack of access to justice due to poverty

It has been 26 years since the end of Apartheid, yet South Africa continues to experience severe levels of poverty. More than 55.5% of the population live below the

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[78] Klare (1998) *SAJHR* 150.
[79] J Brickhill & Y Van Leeve "Transformative Constitutionalism – Guiding light or empty slogan?" (2015) *Acta Juridica* 141 142.
[80] 142.
[81] 143.
[82] C Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative law" (2008) 24 *SAJHR* 281 286-287.
[83] See the earlier discussion on administrative justice.
[84] See heading 1 1 3 above.

poverty line, and must make ends meet on less than a R1 227 per month.[85] Exacerbating this problem is South Africa's high unemployment rate of 30.1%.[86] In the words of former Deputy Judge President Mojapelo of the South Gauteng High Court, South Africa remains one of the most unequal societies in the world, with a highly skewed income distribution.[87] He emphasised that there is an ever increasing gap between the rich and the poor, and argued that there cannot be access to justice as long as poverty and unemployment prevails.[88]

It is unsurprising that most South Africans cannot afford to approach the court system, something that is problematic, seeing that the right of access to courts is guaranteed under section 34 of the Constitution. As mentioned above, the court of first instance for the review of administrative action is predominantly the High Court (and designated Magistrate's Courts).[89] However, there are only fourteen provincial High Court divisions,[90] and each are located in urban areas (cities or large towns).[91] This constitutes a barrier to access to justice, seeing that some people have to travel great distances to get to the court. Further, the high costs and time-consuming nature of the judicial process prevents access.[92] It is estimated that, if all procedures are followed and all parties timely perform their respective responsibilities, a review application could take nine months to be finalised before a court.[93] However, it is a well-known fact that securing access to records held by government often poses the greatest

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[85] Anonymous "How much you need to earn each month to be in the richest 1% in South Africa" (22-09-2019) *BusinessTech* <https://businesstech.co.za/news/wealth/336309/how-much-you-need-to-earn-each-month-to-be-in-the-richest-1-in-south-africa/> (accessed 19-12-2019).

[86] Anonymous "Quarterly Labour Force Survey" (23-06-2020) *StatsSA* <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2020.pdf> (accessed 03-07-2020).

[87] K Ramotsho "High litigation costs deprive the poor access to justice" (01-11-2018) *De Rebus* <http://www.derebus.org.za/high-litigation-costs-deprive-the-poor-access-to-justice/> (accessed 26-01-2019); South Africa's consumption expenditure Gini coefficient is 0.63 as of 2015, up from 0.61 in 1996.

[88] Ramotsho "High litigation costs deprive the poor access to justice" *De Rebus*.

[89] See heading 1 3 1 above.

[90] Anonymous (2019) *Department of Justice and Constitutional Development* <http://www.justice.gov.za/about/sa-courts.html> (accessed 16-02-2019).

[91] Anonymous (04-09-2012) *South African Government Information* <https://web.archive.rg/web/20120904234855/http://www.info.gov.za:80/aboutgovt/justice/courts.ht> (accessed 16-02-2019).

[92] J Dugard "Courts and the Poor in South Africa: A Critique of Systematic Judicial Failures to Advance Transformative Justice" (2008) 24 *SAJHR* 214 216.

[93] This is merely an estimation. There are a number of decisions where the time-line has stretched far beyond this period. See in this regard: *President of the Republic of South Africa v Democratic Alliance* (664/17) 2018 ZASCA 79; *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* 2018 1 SA 200 (SCA); *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government* (231/19) 2020 ZASCA 39.

challenge in review applications.[94] Thus, a more accurate time-line could be anything between twelve to eighteen months, if not longer, from launch of an application to date of judgment by the court.[95]

Also, legal representation in the High Court entails the use of advocates in the majority of cases. A junior advocate may charge approximately R550 per hour (or R5500 per day), whilst counsel of ten years' standing could charge between R1500 and R2400 per hour (or between R15 000 and R24 000 per day).[96] Furthermore, should one consult an attorney "to institute or to defend an action", costs of such a consultation may be set at R292.50 (per quarter of an hour), while the "drawing-up, checking, typing, printing, delivery, copies…" of letters, telegrams and facsimiles may be charged at R117.50 per page.[97] This means that costs and fees severely restrict access to justice for the poor, especially civil justice.[98]

Yet, "access to justice is an essential imperative"[99] in South Africa's post-Apartheid era.[100] Dugard has gone as far as to argue that the judiciary has remained "institutionally unresponsive to the problems of the poor"[101] and that it "fails to advance transformative justice."[102] One of her main arguments is that the "judiciary has collectively failed to act as an institutional voice for the poor."[103]

The poor and vulnerable in South Africa thus find themselves in a double bind, they are increasingly reliant on the state administration for their social welfare, but unable to access the primary mechanism to enforce justice in such administrative decision-making.

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[94] *President of the Republic of South Africa v Democratic Alliance* (664/17) 2018 ZASCA 79 paras 4-6.
[95] For illustrative purposes, see: *President of the Republic of South Africa v Democratic Alliance* (664/17) 2018 ZASCA 79. The Democratic Alliance launched their review before the High Court on 4 April 2017, yet due to an appeal to the Constitutional Court, the matter was only finalised in September 2019.
[96] J Klaaren "Towards Affordable Legal Services: Legal Costs in South Africa and a Comparison with Other Professional Sectors" (19-10-2018) *SALRC Access to Justice Conference* <https://www.lssa.org.za/upload/files/Costs%20conference/Prof%20Jonathan%20Klaaren%20Paper%20SALRC%20v%201a.pdf> (accessed 16-02-2019). Please note that costs varies from province to province, and depends on the size and stature of a firm.
[97] GN R 107 in *GG* 43000 of 07-02-2020. Please note that these costs, are to my knowledge, the most recent tariffs and fees. Furthermore, these tariffs are not always a true reflection of how much legal services costs in practice. It may be far higher.
[98] Klaaren "Towards Affordable Legal Services: Legal Costs in South Africa and a Comparison with Other Professional Sectors" *SALRC Access to Justice Conference*.
[99] Ramotsho "High litigation costs deprive the poor access to justice" *De Rebus*.
[100] Ramotsho "High litigation costs deprive the poor access to justice" *De Rebus*.
[101] Dugard (2008) *SAJHR* 215.
[102] 215.
[103] 215.

3 3 The obligation in international law to exhaust domestic remedies

In *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* ("*Koyabe*"),[104] the Court, when discussing section 7(2)(a) of PAJA, held:

> "[a] useful analogous requirement in international law is the customary international law duty to exhaust available domestic remedies before approaching an international tribunal."[105]

It is a recognised principle of customary international law that, should a respondent state provide domestic remedies, the applicant should first exhaust those remedies before approaching an international forum. The purpose of those remedies are to provide states with the opportunity to "find their own solutions",[106] and "to make beneficial use of their access to relevant facts [and] information […]."[107]

The international position is analogous to the South African approach to internal remedies under section 7(2) of PAJA. However, there is one issue not yet seen domestically, but which has been raised by international scholars. Referencing Udombana,[108] the Court in *Koyabe* emphasised that:

> "[a] condition for the application of the local remedies rule is that it must first be determined whether those remedies exist, which implies the *corresponding duty of the state to provide them*. . ." (emphasis added).[109]

This argument in international law, that there should be a recognisable and enforceable duty on states to provide domestic remedies, has been consistently made since the 1960's.[110] It is peculiar that a similar argument in relation to the exhaustion of internal remedies under PAJA has not been made at national (domestic) level.

3 4 Improving access to justice

In light of the project of Transformative Constitutionalism and the almost insurmountable problems posed by poverty, unemployment and lack of access to

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[104] 2010 4 SA 327 (CC).
[105] Para 41.
[106] Para 41.
[107] Para 41.
[108] J Udombana "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and People's Rights" (2003) *Am. J. Int. Law* 1-37.
[109] 2010 4 SA 327 (CC) para 41.
[110] AJP Tammes "The Obligation to Provide Local Remedies" in JH Kok (ed) *Volkenrechtelijke Opstellen aangeboden aan Prof Dr Gesina H. J. van der Molen* (1962) 152 152; AAC Trindade *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (1983) 57; Udombana (2003) *Am. J. Int. Law* 5-6.

justice, the question then becomes whether there is a solution? This is important, because it does not appear from the above that judicial review will always be the most effective remedy in all cases of review of administrative action. Ultimately, the question is whether there is a mechanism that can assist in advancing Transformative Constitutionalism, and assist in providing access to justice?

This thesis will argue in the affirmative, arguing that a system of internal remedies may provide such a solution. The majority of South Africans cannot afford to take the public administration to court, should they feel that they have been adversely impacted by an administrative action. However, if the public administration is required to establish and implement a uniform system of internal controls, then in light of the obligation under section 7(2)(a) of PAJA, there may be appropriate remedial action in place for an aggrieved party. It could create the possibility of affordable and time-friendly mechanisms that must first be exhausted before any party involved will be able to approach a court.[111]

The only issue that poses difficulty is that the research problem highlights the fact that there is no clarity on what constitutes an internal remedy. Also, at this moment, internal remedies only function in the judicial review context, but not in a facilitative manner that is required to provide equal access to justice for all. Thus, there is a need for the current study.

4 Hypotheses

a) In line with the current understanding of administrative justice, it is desirable to have a specific mechanism, other than judicial review, with which administrative action can be challenged.
b) The project of Transformative Constitutionalism, together with a proper reading of the Constitution, requires administrative law to have an effective, accessible and affordable mechanism with which administrative action can be challenged.

[111] *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* 2010 4 SA 327 (CC) para 35: “Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid”.

5 Methodology

The thesis shall the take the form of a classical doctrinal study. By utilising the primary[112] and secondary[113] sources of law, this thesis will analyse the current legal position regarding the use and applicability of internal remedies in South African administrative law. This, together with the below-mentioned theoretical framework, will test the above-mentioned hypotheses, and try to answer the research question.

6 Division of chapters

6 1 Chapter 2

This chapter will investigate the development of the concept of *administrative law*, as understood under the common law Apartheid era, into the concept of *administrative justice* in the new constitutional dispensation. As mentioned above, there was a clear shift from parliamentary sovereignty to constitutional supremacy, which greatly impacted administrative justice. The shift away from the classifications of functions approach towards the functional approach,[114] as well as the realisation of a culture of justification[115] must be clearly set out. Furthermore, the chapter will provide a clear exposition on the reform of South African administrative law that occurred between the years 1990 and 2000,[116] and will emphasise the need for an accountable public administration.

6 2 Chapter 3

The third chapter will seek to analyse judicial review, in view of section 7(2) of PAJA. A discussion of the procedure of judicial review under both the former and current dispensation will be provided so as to enable one to grasp the importance thereof.

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[112] L Kotzé, A Du Plessis & J Barnard-Naudé "Regsbronne en Regsgesag" in T Humby, L Kotzé & A Du Plessis (eds) *Inleiding to die Reg en Regsvaardighede in Suid-Afrika* (2015) 131 134: Primary sources refer to law created by the national and provincial legislatures, as well as the law set out in case law. In this regard, focus shall specifically be on South African legislation and case law.

[113] 134: Secondary sources of law provide information on the primary sources of law. They are supplementary in nature and non-binding. This includes the use of academic journals and other sources.

[114] C Hoexter *Administrative law in South Africa* 2 ed (2012) 173: In the pre-constitutional period, administrative action was not the primary criterion for determining the applicability of administrative law, rather focus was on the identity of the institution performing the function. However, it was held in *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 141: "[w]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not".

[115] Hoexter (2008) *SAJHR* 288: "one in which every exercise of power, including judicial power, is expected to be justified".

[116] H Corder "Reviewing review: much achieved, much more to do" in H Corder & L Van Der Vijver (eds) *Administrative Justice* (2002) 1-19.

Utilising case law, the two procedural requirements of judicial review[117] shall then be discussed,[118] with specific focus placed on the functionality and applicability of the duty to exhaust available internal remedies.[119] The chapter will ultimately conclude with a discussion on the absence of a uniform system of internal controls.

6 3 Chapter 4

This chapter shall emphasise the dual nature of administrative law. The nature of administrative law is twofold:

> "on the one hand, administrative law aims to restrict public power (control); on the other hand, administrative law aims to enable and facilitate the exercise of public power (empowerment)".[120]

Chapter 4 will argue that the duty under section 7(2)(a) of PAJA to exhaust internal remedies satisfies the first leg, namely, control. However, the absence of a uniform system of internal controls in South Africa means that the second leg of administrative law, empowerment, is absent. There is control, but no empowerment.

It was argued above[121] that the new constitutional dispensation envisions the realisation of the project of Transformative Constitutionalism. The *Batho Pele* principles requires a public administration that is efficient, accountable and transparent.[122] Yet, how can this vision be realised without there being a general duty on the public administration to have internal mechanisms in place through which they can be held directly accountable? The only choice for an aggrieved party in the absence of internal remedies is to approach a court for judicial review, which may be unaffordable and time-consuming.

Chapter 4 will thus seek to establish a basis for the argument that there should be a general duty on the public administration to have internal remedies in place that require exhaustion under section 7(2)(a) of PAJA.

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[117] See heading 1 3 1 above.
[118] S Budlender & E Webber "Standing and procedure for judicial review" in G Quinot (ed) *Administrative justice in South Africa: An Introduction* (2016) 219 227.
[119] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Formerly Tropical Paradise 427 (Pty) Ltd* 2010 3 All SA 577 (SCA) para 19; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* 2014 5 SA 138 (CC) paras 127-133; *Nichol v Registrar of Pension Funds* 2008 1 SA 383 (SCA) para 15.
[120] Maree "Administrative authorities in legal context" in *Administrative justice in South Africa* 58.
[121] See heading 3 1 above.
[122] See heading 3 1 above.

6 4 Chapter 5

If the premise that there should be a duty on the public administration to have internal remedies in place is accepted, then the second element of the research question must be addressed, namely the content and scope of internal remedies. The basic criteria to be satisfied is highlighted above.[123] Thus, chapter 5 will seek to determine what an effective internal remedy for the purposes of a uniform system of internal controls must entail. In this regard, mechanisms which are considered to amount to internal remedies (or not) will be reviewed. The focus shall be on local government law, specifically section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("Systems Act") and regulations 49 and 50 of the Supply Chain Management Regulations.

Chapter 5 will scrutinise South African case law to determine why the content of section 62 has been uniformly accepted as an internal remedy requiring exhaustion, but not that of regulations 49 and 50.[124] Chapter 5 will show that in order to determine the content and scope of effective internal remedies that can ensure an efficient, accountable and transparent public administration, alternatives to local government law need to be explored.

6 5 Chapter 6

In light of the absence of agreement on what constitutes an effective internal remedy, chapter 6 will flow from chapter 5 and review further examples of internal remedies in the immigration, social welfare and school fee context. These remedies are highlighted due to focus being on enabling marginalised sections of society (such as the poor) to gain access to the justice system.

This chapter will involve an in depth study of these internal remedies, as a means to support the argument that South African administrative law is in need of a uniform system of internal controls, to advance the *Batho Pele* principles, as well as the project of Transformative Constitutionalism, to realise an accountable public administration.

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[123] See heading 1 3 3 above.

[124] See: *Syntell (Pty) Ltd v City of Cape Town* 2008 ZAWCHC 120; *CC Groenewald v M5 Developments (Pty) Ltd* 2010 ZASZA 47; *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* 2014 3 All SA 560 (ECG); *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* 2015 ZASCA 146.

6 6 Conclusion

Lastly, this chapter will unify the first 6 chapters and indicate whether the research was successful in answering the research question and proving the hypothesis. Chapter 7 shall be concise, so as to merely emphasise the main points of conclusion already stipulated in the preceding chapters, and provide my recommendations for the criteria of a uniform system of internal remedies.

Chapter 2: From Administrative law to Administrative justice: Moving from the common law to the post-1994 constitutional dispensation

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1 Introduction

As the winds of change brought democracy and considerable social, political and economic change to the shores of South Africa in the last decade of the twentieth century, so too did it transform administrative law between the years 1990 and 2000. Under the common law, South African administrative law was based on the doctrines, traditions and conventions of the English law.[1] Further, the principles of legislative supremacy and parliamentary sovereignty applied.[2] The Constitution was not supreme. With the advent of democracy, however, both the Interim Constitution[3] and the Constitution confirmed the Constitution's supremacy, and that of the rule of law.[4]

Due to a number of reforms,[5] South African administrative law experienced a shift towards an all-encompassing concept, known as "administrative justice".[6] Administrative law is no longer simply concerned with judicial review before the courts.[7] Rather, it also considers "alternative methods of scrutinising the fairness and justice of administrative conduct."[8]

This shift towards administrative justice shall be discussed in depth throughout the remainder of this chapter. A critical understanding of this concept contributes to, and supports, the need for a duty on the state to provide a system of internal remedies.[9] Accordingly, the chapter will first attempt to define administrative law in general (this will be done by considering a multiplicity of working definitions under both the common law and the post-1994 dispensation), where after the position of administrative law under the common law shall be set out, together with the reforms that enabled the shift towards the broader concept of administrative justice. Lastly, an in-depth exposition on the concept of administrative justice shall be provided, so as to convey its impact on the question of exhaustion of internal remedies under section 7(2)(a) of PAJA.[10]

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[1] L Baxter *Administrative law* (1994) 30.
[2] 30.
[3] S4(1) of the Constitution: "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency".
[4] Ss 1(c) and 2 of the Constitution.
[5] See heading 4 below.
[6] See heading 5 below.
[7] H Corder "The development of administrative law in South Africa" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 1 4.
[8] 4.
[9] See heading 6 3 in chapter 1. Further discussion shall ensue in chapter 4.
[10] See heading 1 1 1 and 1 3 2 in chapter 1.

2 Defining administrative law

2 1 Common law

Under the common law, it was recognised that there were numerous approaches to defining administrative law. Baxter highlighted that there was "little agreement as to its precise outer boundaries, and the perceptions of the subject and its central concerns [were] continuously changing and broadening."[11] Nevertheless, Baxter defined administrative law as:

> "that branch of public law which regulates the legal relations of public authorities, whether with private individuals and organisations, or with other public authorities…"[12]

Wiechers provided a similar definition, albeit in Afrikaans, emphasising that:

> "[a]dministratiefreg is daardie deel van die publiekreg wat die organisasie, bevoegdhede en optredes van die staatsadministrasie reël."[13]

Thus, Wiechers's definition further emphasised that administrative law forms part of the public law, and is concerned with the organisation, capacity and actions of the state administration.

In short, Baxter summarised general administrative law as follows:

> "It stipulates a set of common principles which are designed to promote the effective use of administrative power, to protect individuals and organisations from its misuse, to preserve a balance of fairness between public authorities and those with whom they interact, and to ensure the maintenance of public interest."[14]

It is however important to note a number of parallels between the common law and post-1994 definitions of administrative law, seeing that the common law continues to exist and influence administrative law in the post-1994 dispensation.[15]

2 2 Post-1994 constitutional dispensation

Under the current dispensation, recognition was once again given to the fact that there can be no set definition for administrative law in general. Corder emphasises

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[11] Baxter *Administrative law* 55.
[12] 2.
[13] In English: "administrative law is that part of the public law that governs the organisation, capacities and actions of the public (state) administration" (own translation). See: M Wiechers *Administratiefreg* 2 ed (1984) 2.
[14] Baxter *Administrative law* 3.
[15] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 45; A Breitenbach "The place of the common law in 'constitutional administrative law'" in H Corder & L Van der Vijver (eds) *Administrative justice* (2002) 40.

that one should not seek to find "absolute clarity or certainty [with regards to the] many rules of administrative law."[16] Thus, Corder defines administrative law as follows:

> "[a]dministrative law is that part of constitutional law which both empowers those exercising public authority or performing public functions through the law, and which holds accountable to rules of law all those who exercise public power or perform public functions."[17]

Devenish, Govender and Hulme also attempt to define administrative law, by stating that:

> "administrative law, which is a part of the domain of public law, regulates the organisation, capacities and actions of the state in its interactions with individuals and juristic persons."[18]

It therefore becomes apparent, that administrative law forms part of public law, is concerned with those exercising public power or performing public functions, and simultaneously attempts to hold those same actors accountable for their decisions and/or actions. Accountability becomes the focal point of administrative law (and more so of administrative justice) under the new dispensation.[19]

3 Administrative law under the common law

Under the common law, the majority of South African administrative law could be found in South African statute and case law.[20] However, unwritten rules of administrative law were drawn primarily from English law.[21]

Firstly, the doctrines of parliamentary sovereignty and legislative supremacy formed an integral part of South Africa's Apartheid Constitutions.[22] As a result, the courts had no power to question the validity of enacted Acts of parliament, and had to both observe, as well as enforce, the will of parliament, whether the bench agreed with the content of the enacted legislation or not.[23] Emphasising the impact of these doctrines, Stratford ACJ wrote in *Sachs v Minister of Justice*,[24] that:

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[16] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 3.
[17] 3.
[18] GE Devenish, K Govender & D Hulme *Administrative law and Justice in South Africa* (2001) 7.
[19] See the discussion under heading 5 below.
[20] Wiechers *Administratiefreg* 37-38.
[21] For an in depth exposition on these rules, see: Wiechers *Administratiefreg* 38-39.
[22] This was the position ever since the enactment of the Statute of Westminster by the British Parliament in 1931. See: Baxter *Administrative law* 30.
[23] 30.
[24] 1934 AD 11.

> "[p]arliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway, and … it is the function of the courts of law to enforce its will."[25]

Further, in 2004 Justice O'Regan summarised the common law position as follows:

> "[f]rom the early part of the last century, the courts generally […] capitulated the force of the legislature and executive bent on the abuse of power for racial ends."[26]

The above indicates that there was little room for the judiciary to be critical, or exercise any form of independent authority. It was subservient to the legislature.[27] This formed the basis on which judicial review had to occur, as parliament had the power to authorise any administrative action it deemed fit.[28]

Secondly, administrative law was primarily premised on the *ultra vires* doctrine.[29] The doctrine is linked to both the separation of powers and parliamentary sovereignty principles, and holds:

> "in applying the law, the courts must ensure that Parliament's intention is carried out. It allows judges to strike down governmental action falling outside the parliamentary mandate."[30]

It provided an "inherent" rationale for judicial review, implying that the court required no statutory authorisation to perform judicial review.[31] In short, Baxter highlights that:

> "[t]he self-justification of the *ultra vires* doctrine is that its application consists of nothing other than an application of the law itself, and the law of parliament [included]."[32]

Thirdly, the review capacity of courts could be completely nullified through the use of so-called "ouster clauses".[33] An ouster clause "is a provision in a statute that attempts to shield the exercise of particular administrative power from legal scrutiny,

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[25] 37.
[26] K O'Regan "Breaking Ground: Some Thoughts on the Seismic Shift in Our Administrative Law" (2004) 121 *SALJ* 424 424.
[27] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 2 SA 23 (CC) para 25.
[28] Baxter *Administrative law* 30.
[29] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 16.
[30] C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 486, footnote 7.
[31] Baxter *Administrative law* 303.
[32] 303.
[33] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 16.

particularly by the courts."[34] These provisions were often utilised due to the application of the *ultra vires* doctrine, as explained above. Therefore, through the assignment of wide-reaching discretionary powers to, for example, the State President under the former Public Safety Act 3 of 1953,could promulgate regulations to oust the capacity of courts to review the lawfulness of laws and regulations.[35] This further enforced the principle of parliamentary sovereignty. Parliament had the power to determine the issues to be decided by the courts.[36]

Fourthly, the separation of powers principle was fundamental to the functioning of administrative law.[37] There are three branches of government,[38] with the main issue being the delineation of how far the capacity of courts, to review the actions of the other two branches of government, extends.[39] Under the common law, the courts and legal practitioners made extensive use of the "classification of functions" doctrine (also known as the institutional approach).[40] This was done in an attempt to provide coherence to administrative law, and determine whether the principles of natural justice, *audi alteram partem* (listen to the other side)[41] and *nemo iudex in sua causa potest* (no one should be a judge in their own cause/interest)[42] applied to a set of facts. A reviewing judge would attempt to classify the administrative conduct in question into one of five categories.[43] In light of the severe restrictions placed on the rights and civil liberties of the majority of South Africa's citizens, people often turned to administrative law, and more specifically judicial review, to "curtail or ameliorate the effects of

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[34] G Quinot "Regulating administrative action" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 95 98.

[35] S2 and 3(1)(a) of the Public Safety Act; for a further analyses regarding the impact of wide discretionary powers being conferred on officials, see: WHB Dean "Our Administrative Law: A Dismal Science" (1986) 2 *SAJHR* 164 167.

[36] It could be argued that ouster clauses began to provide a basis for the use of internal remedies. The idea that solutions should be sought from an institution, other than the courts. In chapter 4, the rationale behind the implementation of a uniform system of internal remedies will be discussed, together with the idea that the administration should be empowered to correct its own mistakes.

[37] Baxter *Administrative law* 30; Wiechers *Administratiefreg* 17.

[38] The executive, the legislature and the judiciary.

[39] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 12.

[40] 12; see the discussion under heading 5 2 2.

[41] M Murcott "Procedural Fairness" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 145 145.

[42] 145.

[43] The action's nature would be classified as being of a (a) law-making; (b) judicial; (c) quasi-judicial; (d) purely administrative; or (e) ministerial nature. See Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 12.

executive and administrative tyranny."[44] Administrative law became a mechanism used by people to fight the injustices of Apartheid. Thus, in an attempt to limit the scope of judicial review, courts relied on the classification of functions doctrine.[45]

In conclusion, in 1986 W H B Dean provided an in-depth analysis on the state of South African administrative law. His conclusions led him to refer to this subject as a "dismal science."[46] Writing on the need for the legislature to provide enabling legislation that courts could employ in their review of administrative decisions, he held that:

> "[i]t is a process which involves not only legal skills of a high order, but also imagination to adapt old arguments to new uses. If South African administrative law is to cease to be a 'dismal science', we must try harder."[47]

In light of this conclusion, the following section aims to set out the four stages of reform deemed critical for the shift to administrative justice.

4 The reform of South African administrative law: 1990-2000

4 1 The first stage

In February 1993, approximately 100 South African delegates, as well as international scholars, attended a three-day conference at the Breakwater campus of the University of Cape Town.[48] The conference, "Administrative Law for a future South Africa", resulted in a two-page document which listed both terms of agreement, and areas requiring urgent attention, and became known as the "Breakwater Declaration." One of the most important proposals to flow from the conference, was to include a right to administrative justice in the future Constitution,[49] although its parameters was not yet delineated.

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[44] H Corder "Without Deference, With Respect: A Response to Justice O'Regan" (2004) 121 *SALJ* 438 439.
[45] 439: "[…] many such applications for judicial review in the past would now be pursued by reference to other rights in the Bill of Rights."
[46] Dean (1986) *SAJHR* 176.
[47] 176.
[48] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 17; H Corder "Reviewing review: much achieved, much more to do" in H Corder & L Van der Vijver (eds) *Administrative justice* (2002) 1 3-4.
[49] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 17.

4 2 The second stage

The second stage was earmarked by the eventual inclusion of a right to administrative justice in section 24 of the Interim Constitution. Although delegations to the Multi-Party Negotiation Process could see the value of such a right, its formulation was steeped in controversy.[50] Those who would form part of the future government remembered the damage "which could be inflicted as the result of the unbridled exercise of power and appreciated the role played by judicial review during apartheid."[51] Yet, they simultaneously did not wish to be too constrained in their freedom to ensure good governance and "socio-economic reconstruction and redistribution."[52]

As a result, section 24 of the Interim Constitution was redrafted and renegotiated and finally set out as follows:

"Every person shall have the right to-

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

4 3 The third stage

Despite its "generous and innovative provisions",[53] the post-Apartheid ANC-led government increasingly saw section 24 as hindering their discretionary exercise of power,[54] and proposed removing the right to administrative justice from the final Constitution.[55] The government felt that replacing section 24 with a "comprehensive

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[50] 17.
[51] 17.
[52] Corder "Reviewing review: much achieved, much more to do" in *Administrative justice* 7.
[53] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 18.
[54] Corder "Reviewing review: much achieved, much more to do" in *Administrative justice* 8.
[55] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 18.

statutory regime"[56] would be more appropriate. However, the proposal was met with considerable opposition, and a compromise was struck.[57] There would be a right to administrative justice in the Constitution, as well as a provision calling for the statutory regulation thereof.[58]

Ultimately, section 33 of the Final Constitution reads as follows:

"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

4 4 The fourth stage

In January 1999, the working committee of the South African Law Commission began its work on the draft bill on administrative justice.[59] The draft bill proposed an "intricate and detailed" definition for "administrative action", a certain minimum content for compliance with procedural fairness, as well as a notice or comment procedure (or a public enquiry) for acts which affects the public.[60] Ultimately, the proposal was seen as progressive and providing for a flexible and accessible process of administrative review.[61] Nevertheless, upon the draft bill being submitted to the Parliamentary Portfolio Committee on Justice, extensive changes were made to the bill, removing much of that flexibility and progressiveness.[62]

Both houses of Parliament ultimately approved the bill, and the President signed PAJA into law on 3 February 2000. PAJA sets out to regulate the entire administrative

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[56] 18.
[57] 18.
[58] 18.
[59] 18.
[60] Corder "Reviewing review: much achieved, much more to do" in *Administrative justice* 10.
[61] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 19.
[62] 19.

law regime, and, in terms of the principle of subsidiarity,[63] is the first port of call for any person wishing to challenge an administrative action. Accordingly, PAJA and the Constitution constitute the primary sources of administrative justice. However, to enable one to understand their impact, one needs to comprehend what is meant by a right to administrative justice.

5 Administrative justice under the post-1994 constitutional dispensation

5 1 Democracy and constitutional supremacy

On 27 April 1994, when all South African citizens went to the polls to vote in the first democratic elections in South African history, the Interim Constitution entered into force and signalled a decisive break with the past. Three years later, on 4 February 1997, the Constitution came into force.

Section 1 of the Constitution, the foundation clause, emphasises the core values of a democratic South Africa, stating that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

The Constitution therefore makes it clear that the state shall be based on a democratic system of government, with a supreme Constitution. The principle of parliamentary sovereignty no longer applies, and all, including parliament, is subject to the Constitution.

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[63] In *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC), the court held at para 96 that: "[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation." This statement summarises the principle of subsidiarity, in that the principle requires one to first utilise the particular statute aiming to give effect to a particular constitutional right, before relying on the constitutional right itself. When a statute exists, one cannot rely directly on the provision in the Constitution itself. For a further discussion on the subsidiarity principle, see: P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 584-586.

Further, in stark contrast with Apartheid, the independence of the South African judiciary is enshrined in the Constitution, with section 165 affirming the following:

"(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts; […]."

This highlights the fact that the Constitution now "empowers courts to be the guardians of the Constitution and to ensure that the state respects, protects, promotes and fulfils the rights in the Bill of Rights."[64] Therefore, contrary to the position under the common law, it is no longer possible to oust the jurisdiction of the courts through so-called ouster clauses. However a court's jurisdiction over a matter may still be delayed.[65]

5 2 A right to administrative justice

5 2 1 Section 33 of the Constitution

As stated above, section 33(1) provides that "everyone has the right to [just] administrative action that is lawful, reasonable and procedurally fair."[66] The right to administrative justice can no longer be regarded as a common law tradition, rather it has been elevated to a constitutional guarantee.[67] It now qualifies as a human right in the Bill of Rights, and is subject to sections 7,[68] 8[69] and 36[70] of the Constitution.[71] O'Regan emphasised that "it was, and remains, rare for a Bill of Rights to contain a clause of this type. But perhaps it was not surprising in the South African context."[72] Recognising the injustices of the past, it quickly became apparent that a right to administrative justice was necessary under the new constitutional dispensation.

With the enactment of PAJA, in line with section 33(3), the right to administrative justice became fully operational and enforceable. As mentioned above,[73] PAJA is the

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[64] O'Regan (2004) *SALJ* 433.
[65] J Klaaren "Three Waves of Administrative Justice in South Africa" (2006) *Acta Juridica* 370 378.
[66] See heading 4 3 above.
[67] See heading 1 1 1 in chapter 1.
[68] S7 affirms that the Bill of Rights enshrines the rights of all South Africans, that it places a duty on the state to "respect, protect, promote and fulfil" the rights in the Bill of Rights, and lastly, that all rights in the Bill of Rights are subject to the limitation analyses in section 36.
[69] S8 affirms the vertical and horizontal application of the Bill of Rights.
[70] S36 is the limitation analyses.
[71] P Maree "Administrative authorities in legal context" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 28 33.
[72] O'Regan (2004) *SALJ* 424.
[73] See heading 4 4 above.

primary mechanism to be employed when challenging an administrative action. However, in order for PAJA to find application, an applicant must be able to show that the administrative issue in question, falls within the parameters of an "administrative action", as defined in section 1(*i*) of PAJA.[74] As a result, the concept of "administrative action" fulfils a "gateway" function, and aims to prevent a reviewing body from becoming overburdened with countless review matters.[75]

5 2 2 The shift from an institutional to the functional approach

The classification of functions doctrine (institutional approach) was ultimately rejected by the courts,[76] and a new approach, known as the functional approach, was adopted. Key to this development, was the Constitutional Court judgment in *President of the Republic of South Africa v South African Rugby Football Union* ("*SARFU*").[77] This judgment is fundamental to both the interpretation of section 33, as well as the operation of administrative law in general.[78]

SARFU characterised administrative action as the "legal regulation of all public power."[79] This implies that administrative action is "an incidence of the exercise of public power."[80] It is for this reason, that the court in *SARFU* emphasised the role performed by the public administration,[81] as a part of the executive, noting that section 33 specifically uses the word *administrative*, not *executive* action.[82]

The above led the court to conclude that:

> "[w]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. […] The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."[83]

This means that regardless of the branch of state concerned, where it performs a public function, it shall be the nature of that function that determines whether public

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[74] See heading 1 1 1 in chapter 1.
[75] See heading 1 1 1 in chapter 1.
[76] *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 737F-H; *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) 10I-J.
[77] 2000 1 SA 1 (CC).
[78] G Quinot & P Maree "Administrative action" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 66 72.
[79] 72; this also links with Corder's definition of administrative law under heading 2 2 above.
[80] 72.
[81] See heading 5 2 3 below.
[82] 2000 1 SA 1 (CC) para 141.
[83] Para 141.

law principles find application, and not its identity or nature.[84] It must be noted that the Constitutional Court judgment of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [85] also found that the scope of the functional approach may include the activities of private entities.[86] This was based on, amongst other things, the consideration of foreign law, as well as the definition of organ of state in section 239 of the Constitution.[87]

Lastly, complementing the functional approach, is the accompanying shift to a so-called "culture of justification."[88] In 1994, Mureinik wrote that what the new Constitution required, was a move from a "culture of authority to a culture of justification."[89] This was supported by an article he wrote the previous year, in which he held that "[t]he best that democracy can be, is a system in which the government responds to the governed."[90] This meant that government should foster participation and accountability, implying that government should "justify its decisions to those whom it governs."[91] Similarly, Hoexter wrote that one of the central features of "transformation envisaged by the Constitution" is the "promotion of a 'culture of justification' in public law interactions."[92] This, applied more generally, would mean that it is insufficient for an actor, regardless of who or what it may be, to simply take a decision - it must also be able to explain why the decision or action was taken. This can be deemed to speak to the broader theme of accountability, and its importance in the post-Apartheid era.

5 2 3 The public administration

As mentioned above,[93] under the separation of powers principle, there are three main branches of state, namely: the executive, the legislature and the judiciary. Each branch is capable of performing an administrative action.[94] This thesis focusses specifically on the executive branch of state, and more so on the public administration itself.

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[84] Quinot & Maree "Administrative action" in *Administrative justice in South Africa* 73.
[85] 2007 1 SA 343 (CC).
[86] Quinot & Maree "Administrative action" in *Administrative justice in South Africa* 74-75.
[87] 74-75.
[88] Corder "The development of administrative law in South Africa" in *Administrative justice in South Africa* 2.
[89] 2.
[90] E Mureinik "Reconsidering Review: Participation and Accountability" (1993) *Acta Juridica* 35 35.
[91] 46.
[92] C Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" (2008) 24 *SAJHR* 281 286-287.
[93] See heading 3 above.
[94] See heading 1 1 2 in chapter 1.

The executive in general can be defined as that "branch of state within the separation of powers primarily concerned with the formulation of policy and the implementation of legislation and policy."[95] As a subdivision of the executive, the public administration, which has no set definition,[96] is concerned only with the implementation of legislation and policy.[97] In this regard, the Constitutional Court in *SARFU* held:

> "Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently."[98]

Although the "variety of constitutional controls" that the Court referred to, can be found throughout the Constitution, it is chapter 10 of the Constitution that is of particular importance. This chapter focuses specifically on the public administration, and sets out the basic principles and values that should govern a democratic public administration. Section 195(1) holds:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
>
> (f) Public administration must be accountable.

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[95] Maree "Administrative authorities in legal context" in *Administrative justice in South Africa* 29.
[96] MP Ferreira-Snyman "Demokrasie en die openbare administrasie" (2005) 45 *Tydskrif vir Geesteswetenskappe* 79 79.
[97] Maree "Administrative authorities in legal context" in *Administrative justice in South Africa* 30.
[98] 2000 1 SA 1 (CC) para 133.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

Section 195(3) then further places a duty on the state to enact national legislation to ensure the implementation and realisation of these values and principles.

As a result, the state embarked on an all-encompassing overhaul of the public administration. This overhaul began with the commencement of the Public Service Act, 1994 ("PSA"), on the 3rd of June 1994.[99] The PSA provides in its long title that it is promulgated:

"[t]o provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service, and matters connected therewith."

Subsequently, the PSA was followed by the promulgation of the *WPTPS*.[100] The purpose of the *WPTPS* was to establish a policy framework to guide "the introduction and implementation of new policies and legislation aimed at transforming" the public service.[101] It demanded a "representative, coherent, transparent, efficient, effective, accountable and responsive"[102] public service, capable of responding to the needs of those whom it serves. In 1997, the *WPTPS* was officially adopted, and became known as the policy of *Batho Pele*.[103]

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[99] Although it is referred to as an Act, and treated as such, it is not numbered. (See footnote 79 in Maree "Administrative authorities in legal context" in *Administrative justice in South Africa* 44.) It was promulgated by the President pursuant to his powers under section 237(3)(a) of the Interim Constitution. See: Proc R 103 in *GG* 15791 of 03-06-1994:
"Under the powers vested in me by section 237(3) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), I hereby replace the laws on public services with the law as set out in the Schedule. Given under my Hand and the Seal of the Republic of South Africa at Pretoria this First day of June, One thousand Nine hundred and Ninety-four. N. R. MANDELA, President."

[100] GN R 1459 of *GG* 18340 of 01-10-1997.

[101] TI Nzimakwe & Z Mpehle "Key factors in the successful implementation of Batho Pele principles" (2012) 7 *J. Public Adm.* 279 280.

[102] 280.

[103] 281.

Batho Pele, translated literally, means "putting people first."[104] In line with the Constitution, it aims to promote equal, effective and sustainable service delivery throughout all levels of government.[105] It demands a "citizen-orientated approach to service delivery."[106] *Batho Pele* should not be seen as a plan, but rather as an "attitude or set of values"[107] that should transform the public service, and thus the public administration as a whole. This set of values can be summarised in eight points, namely: (a) regular consultation with customers; (b) specific service standards; (c) high levels of courtesy; (d) provision of more and better information regarding services being provided; (e) openness and transparency regarding services; (f) remedies for failures and mistakes; (g) increasing access to services; and (h) providing the best possible value for money.[108]

Overseeing the realisation of this ambitious project, is the Public Service Commission, established under section 196 of the Constitution.[109] The Commission is empowered to promote the values and principles of section 195, set out above, and to ensure a high standard of ethics in the public administration.[110]

In conclusion, in 2004, Corder wrote:

> "I have always believed that the developmental and service-emphasizing objectives set by the Constitution for the public administration constitute a justifiable framework for review, and I look forward to the day when they are used as such in court."[111]

Although this chapter does not yet focus on judicial review, this statement already highlights the important role that these values and principles fulfil with regards to judicial review and perhaps more so, for the duty to exhaust internal remedies.

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[104] 281.
[105] Ferreira-Snyman (2005) *Tydskrif vir Geesteswetenskappe* 84.
[106] Nzimakwe & Mpehle (2012) *J. Public Adm.* 282.
[107] 282.
[108] 282-283.
[109] "Public Service Commission
196(1) There is a single Public Service Commission for the Republic.
(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation [...]".
[110] Ferreira-Snyman (2005) *Tydskrif vir Geesteswetenskappe* 84.
[111] Corder (2004) *SALJ* 440.

5 3 The significance of the public administration's accountability post-1994

5 3 1 Accountability

Section 1(d) of the Constitution holds that South Africa shall be a "multi-party system of democratic government, to ensure accountability, responsiveness and openness." Further, as highlighted above, there is a recurring theme in both jurisprudence and in literature, that the public administration should be accountable, responsive and transparent.[112] The continual emphasis of these principles, and specifically of accountability, is fundamentally important to this thesis. It is captured in the preamble of PAJA which states that it has been enacted in order to:

> "promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action."

The question may of course be asked: why this emphasis on accountability? Masango and Mfene argue that accountability is important, because, there is a presumption that the absence of accountability would mean "that those in power have the capacity to act without regard for those who authorise their actions and for those whose lives are affected by those actions."[113] Taking note of the atrocities of the past, one can see why an accountable public administration is preferred.

Of course, overemphasis of this principle may pose a danger. In 2002, Hoexter wrote:

> "administrative law ought to facilitate creative decision-making in the public interest, but at the same time permit the effective assertion of citizens' rights and limit any abuses of public power."[114]

Further, in trying to delineate what would constitute procedural fairness, the Constitutional Court in *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal*,[115] held that:

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[112] See discussion under heading 5 2.
[113] RS Masango & PN Mfene "Inculcating values of the Constitution in Public Administration and the Society: A South African Perspective" (2017) 52 *J. Public Adm.* 589 595.
[114] C Hoexter "The current state of South African administrative law" in H Corder & L Van der Vijver (eds) *Administrative justice* (2002) 21 27.
[115] 1999 2 SA 91 (CC).

> "[a]s a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly."[116]

The Court called for a balance to be struck between the need to eradicate unfair discrimination on the one hand, and the obligation to act fairly on the other.[117] Applying the same argument to accountability, there must be a balance between demanding accountability from the public administration, and at the same time, allowing it to perform its functions efficiently and promptly, while not overburdening it with the constant need to justify each and every decision or action it takes.

This balance is in fact also called for in section 33(3)(c) of the Constitution, which emphasises the need for legislation to promote an "efficient administration". Corder notes that section 33 specifically differentiates between the rights "accorded to 'every one'" and the "rights which is granted only to those who have been 'adversely affected' by [an] action."[118] This links back to the earlier discussion regarding the term "administrative action" fulfilling a gateway function to PAJA.[119] Corder emphasises that PAJA effectively "erects a series of barriers that have to be surmounted before a claimant can obtain the promised rights."[120] Nevertheless, Corder is of the opinion that the drafters of PAJA would argue that these "barriers" are reasonable and justifiable, not only in terms of section 36 of the Constitution, the limitation clause, but also to ensure an efficient administration.[121]

Thus, achieving this balance is an endeavour to be aspired to by all in the public administration, as well as those wishing to rely on their rights under section 33 of the Constitution. Yet, it remains crucial that those whom the public administration serves, are able to call it to account when it fails in the performance of its mandate.

5 3 2 PAJA, a lost opportunity

Immediately following the enactment of PAJA, Hoexter wrote a highly influential article on the future of judicial review in South African administrative law.[122] She began

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[116] Para 41.
[117] Para 44.
[118] Corder "Reviewing review: much achieved, much more to do" in *Administrative justice* 11.
[119] See heading 5 2 1.
[120] Corder "Reviewing review: much achieved, much more to do" in *Administrative justice* 11.
[121] 11.
[122] Hoexter (2000) *SALJ* 484.

by writing that South African administrative law "cried out for two things" in the twentieth century:

> "First, it called for completion. There was a need to develop an integrated system of administrative law in which judicial review could play a more suitable and more limited role. Secondly, it called for the construction of an appropriate theory of deference. There was a need to identify principles to guide the courts' intervention and non-intervention in administrative matters."[123]

The history of South Africa, she argued, explained both of these requirements, because administrative law had, at the time, always been dominated by judicial review, while "other controls and safeguards […] [had] been relegated to unimportant positions or neglected altogether."[124] With the advent of democracy, the hope of administrative lawyers was that both the Constitution and legislation would provide for this integrated system of administrative law, enabling a more "balanced approach to judicial intervention."[125] However, PAJA, Hoexter wrote, disappointed any such hope and could be seen as an "opportunity lost".[126]

The reason for this argument is that South African administrative law "has never had much to offer except judicial review."[127] South Africa has never had an integrated system where judicial review functioned "supplementary to the business of making good decisions, and in which other forms of control and reconsideration – such as administrative adjudication – [could be] taken seriously."[128] PAJA does not provide an adequate basis for an integrated system of administrative law, and continues to emphasise the importance of judicial review.[129] It ends up increasing the "primacy of judicial review."[130]

Therefore, in spite of emphasising the importance of accountability, together with the maintenance of an appropriate balance between accountability and efficiency, this thesis shall argue that South African administrative law, under the broader umbrella of administrative justice, continues to place too much emphasis on judicial review.

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[123] 484.
[124] 484.
[125] 484.
[126] 499.
[127] 485.
[128] 485-486.
[129] For a further discussion on the limits and limitations of review, see Hoexter's article 488-494. See also: Hoexter "The current state of South African administrative law" in *Administrative justice* 28.
[130] Hoexter (2000) *SALJ* 495; this shall be discussed in more depth in chapter 3.

According to Hoexter, PAJA does not directly address what some might regard "as the perfect rival to judicial review," namely "the opportunity to have a decision reconsidered by the administration itself."[131] This thesis, in conjunction with Hoexter's argument,[132] shall argue that one mechanism through which the administration could review its own mistakes, is by way of internal remedies. Internal remedies can be utilised to counter the continued emphasis of judicial review, and ensure the realisation of a more integrated system of administrative law in South Africa, one in which there is an appropriate balance between accountability and efficiency.

6 Conclusion

Since 1990, administrative law has experienced various stages of development, to such an extent that South African lawyers and academics now focus predominantly on the broader framework of administrative justice. The developments set out above, has at the same time enabled the transformation of the public administration, enabling it to cater for a democratic society, in which all are equal under a supreme Constitution. Therefore, considerable emphasis is placed on the need to ensure an accountable, responsive and open public administration.

Numerous mechanisms exist to ensure that the vision of a public administration that complies with the principles of both *Batho Pele* and accountability is realised. Yet, as highlighted above, PAJA continues to endorse judicial review as the dominant mechanism through which administrative errors should be corrected. This continues to be the prevailing position, in spite of the preferred option of a more integrated system of administrative law in South Africa. In advancing the need to realise this integrated system, this thesis focuses on how a system of internal remedies could help to realise a system in which the public administration can be held accountable to those whom it serves, while at the same time being empowered to perform its mandate promptly and efficiently. It is for this reason that internal remedies, as part of the broader mechanism of judicial review, shall be discussed in the following chapter.

[131] 497.
[132] 497.

Chapter 3: Analysing judicial review in light of section 7(2) of PAJA

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1 Introduction

In 2000, Max du Plessis published a paper on the legitimacy of judicial review in South Africa's new constitutional dispensation, and held:

> "[t]he general conclusion seems to be that judicial review is an essential part of the democratic process, and that the disadvantages attached to the court's powers of judicial review, are outweighed by the advantages of having judges perform an independent check on government."[1]

The primacy of judicial review in South African administrative law is well-established as a mechanism through which accountability of the public administration can be maintained.[2] Nevertheless, it is no longer the sole mechanism for doing so. As mentioned in chapter 2,[3] Hoexter believes that PAJA does not adequately address what could be "the perfect rival to judicial review",[4] namely "the opportunity to have a decision reconsidered by the administration itself",[5] which can occur by means of the utilisation of internal remedies. It is for precisely this reason that the third chapter of this thesis shall provide an in depth exposition on judicial review, with the aim of providing a greater understanding of the duty to exhaust internal remedies.

A discussion on judicial review must start with what is considered its core, namely that it does not amount to the hearing of an appeal. Taking a matter on review, does not mean one appeals against the decision of the administrator in question. This distinction shall serve as the point of departure for this chapter. Thereafter, the key aspects of judicial review under both the common law and current constitutional dispensation shall be set out. This will be followed by a discussion on the procedural requirements that must be complied with, before proceedings for judicial review may be instituted. Lastly, the functionality of the duty to exhaust internal remedies shall be explained with reference to both the common law and PAJA, which shall enable one to ask the fundamental question, namely: what qualifies as an internal remedy in need of exhaustion?

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[1] M du Plessis "The legitimacy of judicial review in South Africa's new constitutional dispensation: insights from the Canadian experience" (2000) 33 *Comp. Int. Law J. South. Afr.* 227 230. Du Plessis was writing in the context of the counter-majoritarian dilemma.
[2] See heading 5 3 2 in chapter 2.
[3] See heading 5 3 2 in chapter 2.
[4] See heading 5 3 2 in chapter 2.
[5] See heading 5 3 2 in chapter 2.

2 The distinction between review and appeal

In order for an aggrieved party to lodge an application for judicial review in terms of PAJA, such party must be able to prove that the administrative issue in question falls within the definition of "administrative action".[6] Should there be non-compliance with the definition, judicial review under PAJA is not an option, and there is no consideration of the need to exhaust internal remedies under section 7(2) of PAJA.[7] Nevertheless, should there be compliance with PAJA, an aggrieved party may lodge an application for review.[8]

However, a mistake often made, is that the person affected by the administrative action, believes that the application for review, amounts to an appeal against the decision of the administrator. This is a critical misunderstanding of what review entails. Consequently, the difference between these two terms are briefly discussed below.

2 1 Appeal of a decision

Burns writes that the High Court has never enjoyed an "inherent appeal jurisdiction".[9] Such a right will only come into existence upon express statutory authorisation.[10] An appeal means that a matter is re-heard. This implies that the appeals court will examine the merits, as heard in the court *a quo*, and determine whether the decision taken by that court, was right or wrong based on the facts of the case.[11] This further implies that an appeals court is restricted to the court *a quo's* record of proceedings, unless statute provides otherwise.[12]

2 2 Review of a decision

South African courts[13] have a "constitutional mandate to review administrative action based on section 33 and 34"[14] of the Constitution. The court must establish

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[6] S1(*i*) of PAJA. See heading 5 2 1 in chapter 2.
[7] Please note that legality review under the common law will still be a possibility, with the duty to exhaust internal remedies under the common law finding application. See both headings 3 & 5 3 2 below.
[8] S6(1) of PAJA.
[9] Y Burns & R Henrico *Administrative law* 5 ed (2020) 369.
[10] 369.
[11] 369; G Quinot "Regulating administrative action" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 95 107.
[12] Burns & Henrico *Administrative law* 369.
[13] The High Court has always been deemed to serve as the court of first instance for judicial review. However, the Minister of Justice and Correctional Services, on 19 September 2019, identified a number of Magistrate's Courts who possesses the jurisdiction to undertake judicial review of administrative action. The relevant courts were able to hear review matters from 1 October 2019, but the relevant court rules commenced only on 4 November 2019. See GN R 1216 in *GG* 42717 of 19-09-2019.
[14] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 107.

whether there was compliance with the "constitutional requirements of lawfulness, procedural fairness and reasonableness."[15] In short, review considers *how* a decision was taken and whether it was just or not.[16] The sole purpose of review proceedings is to determine whether the administrator complied with its authorised mandate, and exercised its function in accordance with the law.[17] The review court may generally not consider the merits of the case,[18] nor decide whether the decision was right or wrong. It merely determines whether it was a just decision. This is to ensure that there is compliance with the separation of powers principle.[19] For a court to go beyond the determination of whether a decision is just, would mean that it steps into the sphere of the executive arm of government.

It must, however, be stressed that the distinction between appeal and review has become somewhat blurred, particularly in the context of reasonableness review.[20] However, South African courts continue to stress that the distinction remains in place.

In *Carephone (Pty) Limited v Marcus NO*,[21] the Labour Appeal Court held that the requirement of justifiability, which gives effect to "administrative accountability, responsiveness and openness":[22]

> "does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness."[23]

Further, the court held that:

> "[…] value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."[24]

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[15] S33 of the Constitution; Burns & Henrico *Administrative law* 369.
[16] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 107.
[17] 107.
[18] The court may consider the merits during reasonableness review. See the subsequent paragraphs above.
[19] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 107.
[20] Burns & Henrico *Administrative law* 370.
[21] 1999 3 SA 304 (LAC).
[22] Burns & Henrico *Administrative law* 370.
[23] 1999 3 SA 304 (LAC) para 35.
[24] Para 36.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[25] the Constitutional Court also recognised that the distinction remains in place, when it held that:

> "Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."[26]

Accordingly, reasonableness review will inevitably entail a substantive and procedural component, in which the court ventures into a consideration of the merits of the case, but this continues to fall within the ambit of judicial review, and only occurs during reasonableness review. It does not amount to the hearing of an appeal. It is merely done to assist the court in determining whether the decision was rationally justifiable, not whether it was right or wrong.

3 Judicial review in the pre-constitutional dispensation

Prior to the commencement of the Interim Constitution, the common law was regarded as the "source of the Supreme Court's power of judicial review of administrative action."[27] This was confirmed in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* ("*Consolidated Investment*")[28] and *Shidiack v Union Government (Minister of the Interior)*.[29] The court in *Consolidated Investment* held:

> "[…] this court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature; it is a right inherent in the court."[30]

The basis for this "inherent right" of judicial review was founded on the doctrine of *ultra vires*.[31] As explained in chapter 2,[32] the doctrine required no statutory authority to be

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[25] 2004 4 SA 490 (CC).
[26] Para 45.
[27] A Breitenbach "The place of the common law in 'constitutional administrative law'" in H Corder & L Van der Vijver (eds) *Administrative justice* (2002) 37.
[28] 1903 TS 111.
[29] 1912 AD 642.
[30] 1903 TS 111 115.
[31] Breitenbach "The place of the common law in 'constitutional administrative law'" in *Administrative justice* 37.
[32] See heading 3 in chapter 2.

given to courts; rather it encompassed nothing more than the application of the law itself.[33] The doctrine ensured that the main concern of courts were to enforce the will of the legislature.

Secondly, judicial review was based on the rules of natural justice.[34] Developed as a component of the grounds of review, the rules of natural justice concerned itself with procedural fairness.[35] It consisted of two "inalienable rights under the common law",[36] namely: (a) the right to a hearing before an implicated right could be removed,[37] and (b) the idea that no person could be a judge in their own interest.[38] These rules or principles provided the "minimum standards of fair decision-making",[39] but were not "precise rules of unchanging content."[40] Their content could vary depending on the facts of the issue in question.[41]

Thirdly, the common law placed considerable emphasis on the fact that an applicant for judicial review had to have *locus standi in judicio* (standing) before applying for judicial review.[42] The applicant had to prove to the court that he/she had:

> "(a) some legal right or recognised interest [that] is at stake; (b) [that] the right or interest is direct; and (c) [that] the right or interest is a personal (and possibly special) one."[43]

The common law did not recognise an "*actio popularis*"[44] or so-called citizen's action, in terms of which an applicant could ask for review based on the aim of protecting the public interest. Accordingly, Baxter held that the basis of this requirement is to "[ensure] a personal nexus between the complainant and the act complained of."[45] Courts strictly enforced this requirement, noting that it ensures the prevention of an

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[33] L Baxter *Administrative law* (1994) 303.
[34] See heading 3 in chapter 2.
[35] H Corder "The development of administrative law in South Africa" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 1 16.
[36] 16, footnote 32.
[37] *Audi alteram partem*.
[38] *Nemo judex in sua causa potest*.
[39] SA de Smith *Constitutional and administrative law* 3 ed (1978) 561.
[40] 561.
[41] 561.
[42] This will also be discussed under heading 5 below.
[43] Baxter *Administrative law* 652; S Budlender & E Webber "Standing and procedure for judicial review" in G Quinot (ed) *Administrative justice in South Africa: An Introduction* (2016) 219 222.
[44] Baxter *Administrative law* 651.
[45] 654; Budlender & Webber "Standing and procedure for judicial review" in *Administrative justice in South Africa* 222.

over-burdened court roll, effective use of resources, and enables the party "best-placed to litigate the issue",[46] to be the one who approaches the court.[47]

Lastly, extensive use was made of ouster clauses.[48] Ouster clauses nullified the review capacity of courts, thus shielding certain administrative conduct from legal scrutiny.[49] Parties had no right to approach a court to ask for review, should such a clause find application in the circumstances of their particular matter. This allowed the legislature, and by implication, the Apartheid government of the day, to counter the High Courts' inherent right to judicial review under the doctrine of *ultra vires*.

As a result of the above, judicial review took place in a manner mostly uncritical of the government, with the judiciary seldom exercising any real form of independent checks and balances with regards to the government.[50] Although three different branches of government existed under the separation of powers principle, courts were subservient to the legislature, and it was on this basis that it had to investigate whether there was compliance with the rules of administrative law.

4 Judicial review in the constitutional dispensation

In *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* ("*Pharmaceutical Manufacturers*"),[51] the Constitutional Court confirmed that the Constitution, not the common law, now constitutes the foundation on which judicial review occurs.[52] Judicial review is specifically authorised in terms of section 33 of the Constitution, the right to just administrative action which is lawful, reasonable and procedurally fair, in conjunction with sections 1(c) and 2 of the Constitution which confirms the supremacy of the Constitution.[53] This ensures that effect is given to section 195 of the Constitution, which seeks a public administration governed by democratic values and principles.[54]

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[46] Budlender & Webber "Standing and procedure for judicial review" in *Administrative justice in South Africa* 221.
[47] 221.
[48] See heading 3 in chapter 2.
[49] See heading 3 in chapter 2; Quinot "Regulating administrative action" in *Administrative justice in South Africa* 109. Nevertheless, one must note the fact that administrative law, and specifically judicial review, was often used to counter the actions of the Apartheid government, which increased the importance of judicial review under the common law (see the fourth point under heading 3 in chapter 2).
[50] See heading 3 in chapter 2.
[51] 2000 2 SA 674 (CC).
[52] Para 41.
[53] See Quinot "Regulating administrative action" in *Administrative justice in South Africa* 110-111; Burns & Henrico *Administrative law* 362.
[54] See heading 5 2 3 in chapter 2.

This does not imply that the common law is not applicable in the constitutional era. In *Pharmaceutical Manufacturers*, Chaskalson CJ confirmed that the common law is not a system of law separate from the Constitution, by holding that:

> "I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. […] There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[55]

However, its continued existence was confirmed when the Court argued:

> "[this] is not to say that the principles of [the] common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development."[56]

The common law therefore continues to exist and inform judicial review under the constitutional dispensation, but does so to the extent permitted by the Constitution.[57]

Nevertheless, section 33 of the Constitution was never considered to be the sole basis on which courts exercise the function of judicial review.[58] Rather, section 33(3) required that legislation be enacted to give effect to the rights in section 33(1) and (2) of the Constitution. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* ("*Bato Star*"),[59] the Constitutional Court confirmed that "[t]he cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past."[60] Judicial review therefore occurs in terms of PAJA, on the authority assigned to it under the Constitution.[61] Specifically, section 6(2)(a)-(i) of PAJA sets out the grounds on which a party may ask for review of an administrative action. In *Bato Star*, O'Regan J confirmed that these grounds of review "divulge a clear purpose to codify the grounds of judicial review of administrative action."[62]

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[55] 2000 2 SA 674 (CC) para 44.
[56] Para 45.
[57] Burns & Henrico *Administrative law* 362-363; Breitenbach "The place of the common law in 'constitutional administrative law'" in *Administrative justice* 40-41.
[58] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 111.
[59] 2004 4 SA 490 (CC).
[60] Para 25.
[61] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 111.
[62] 2004 4 SA 490 (CC) para 25.

Lastly, as emphasised above,[63] the common law required a party to prove standing (which meant a direct and personal impact on their rights or interests), before applying for judicial review. However, post-1994, standing is seldom an issue due to section 38 of the Constitution. This provision takes a considerably broader approach to standing than the common law, and holds that:

> "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened. […] The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; (e) and an association acting in the interest of its members."

While PAJA itself contains no explicit standing provision, the Constitutional Court, in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*,[64] confirmed that section 38 applies to litigation instituted in terms of PAJA.[65] Thus, PAJA requires standing to be showed, but this requirement is analogous to standing under section 38 of the Constitution, and is therefore broader than under the common law.[66]

In conclusion, post-1994 judicial review occurs by direct authorisation of the Constitution, but entails the utilisation of the process as laid out in PAJA (in terms of the principle of subsidiarity). Furthermore, well-established common law principles continue to inform the review process, but these principles are themselves subject to the Constitution. By necessary implication, this implies an overhaul of the duty to exhaust internal remedies, seeing that PAJA in section 7(2) provides for such a duty prior to judicial review. This overhaul is what shall be discussed in the remainder of the chapter.

5 The procedural requirements to be satisfied prior to judicial review

5 1 General

The enactment of the Interim and Final Constitution, together with PAJA, enabled an overhaul of judicial review. This process was briefly outlined above. Nevertheless, before a party may approach a court to ask for judicial review, they must satisfy a

[63] See heading 3.
[64] 2013 3 BCLR 251 (CC).
[65] Para 29.
[66] Budlender & Webber "Standing and procedure for judicial review" in *Administrative justice in South Africa* 223-224.

series of procedural requirements. These requirements have been amended in the constitutional dispensation. Therefore, the two procedural requirements regarding the time-period within which to launch an application for review and the exhaustion of internal remedies prior to review, as they exist under both the common law and the constitutional era, shall be outlined below. This is to illustrate the shift that has taken place in the application procedure of judicial review.

Included in this discussion is the recent development that organs of state seeking to review their own decisions may not do so under PAJA, but must rather rely on review in terms of the principle of legality.[67] However, the focus of this thesis is not on the utilisation of PAJA by organs of state; rather its concern lies primarily with private parties seeking review, and the role that internal remedies can fulfil in this regard. Further, the requirement that an applicant must have standing in order to approach a review court will not be dealt with here. This requirement has already been discussed at length under headings 3 and 4 above (and is unproblematic for present purposes).

5 2 The time-period within which to launch an application for review

5 2 1 The common law position

Under the common law, there existed no statutory time-limit within which a review application had to be launched.[68] Rather, the party seeking review had to approach the review court within a "reasonable period of time".[69] In *Setsokosana Busdiens (Edms) Bpk v Voorsitter Nasionale Vervoerkommissie* ("*Setsokosana Busdiens*"),[70] the Appellate Division held that "what is reasonable depends, of course, on the (facts and) circumstances."[71]

Where there was a delay in bringing the review application, the courts had to assess the delay, and relied on a two-step approach to assess whether the delay was reasonable. The two-step approach was set out in the case of *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* ("*Wolgroeiers Afslaers*")[72] and *Setsokosana*

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[67] See heading 5 2 3 below.
[68] Burns & Henrico *Administrative law* 593; C Hoexter *Administrative law in South Africa* 2 ed (2012) 532; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 4 SA 331 (CC) para 48.
[69] Burns & Henrico *Administrative law* 593.
[70] 1986 2 SA 57 (A).
[71] 86D-E; see also: Burns & Henrico *Administrative law* 593; Hoexter *Administrative law in South Africa* 532.
[72] 1978 1 SA 13 (A) 39B-D.

Busdiens.[73] These judgments would later be confirmed, in the constitutional era, by the Supreme Court of Appeal in *Gqwetha v Transkei Development Corporation Ltd* ("*Gqwetha*"),[74] which, in turn, was subsequently referred to by the Constitutional Court in *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* ("*Khumalo*").[75] Thus, all four cases will be utilised to set out the common law approach to time.[76]

Under the two-step approach, the first step requires an investigation into whether the delay was "unreasonable."[77] This involves "a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay"[78] In *Khumalo*, the Court was at pains to stress that in the absence of any explanation for the delay, such delay will be unreasonable.[79] Further, in *Gqwetha,* the court specifically noted the nature of the decision as an important material fact to be considered by a court in this enquiry, seeing that "[n]ot all decisions have the same potential for prejudice to result from their being set aside."[80] However, the reasonableness or unreasonableness of the delay (step one) depends wholeheartedly on the facts and circumstances of a particular case, with a court's discretion (step two) being completely irrelevant.[81] It concerns a determination of whether, in light of all possible circumstances, the delay was unreasonable.[82] While this implies a value judgment, it should not be confused with the discretion that the court may exercise under step two[83] of the enquiry.

Secondly, should the delay be found to have been unreasonable (step one), then the court must move on to the second step of the enquiry, and determine whether it should exercise its discretion to overlook the delay and nevertheless allow the application for review (condonation).[84] In this regard, the court in *Gqwetha* held that

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[73] 1986 2 SA 57 (A) 86A-G, where the court quotes *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*.
[74] 2006 2 SA 603 (SCA).
[75] 2014 5 SA 579 (CC) para 49.
[76] The common law continues to apply in the constitutional era. See heading 4 above, and heading 5 2 2 below.
[77] *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* 2014 5 SA 579 (CC) para 49.
[78] *Gqwetha v Transkei Development Corporation Ltd* 2006 2 SA 603 (SCA) para 24.
[79] 2014 5 SA 579 (CC) para 50.
[80] 2006 2 SA 603 (SCA) para 24.
[81] 1986 2 SA 57 (A) 86D-F.
[82] 86D-F.
[83] See the following paragraph of the main text.
[84] 2006 2 SA 603 (SCA) para 31.

the "delay cannot be evaluated in a vacuum but only relative to the challenged decision, and particularly with the potential for prejudice in mind."[85] Thus, the second step requires the court to determine what the potential prejudice could be to the affected parties, as well as the possible consequences of setting aside the decision in question.

In short, if the delay is found to be reasonable under step one, the court does not proceed to step two, but simply hears the application. If the delay is found to be unreasonable, then the court will have to proceed to the second step, and use its discretion to determine whether to condone the delay or not.

However, it is important to note that contrary to PAJA, there was no need for an express (or separate) application for condonation of a delay under the common law. In *Wolgroeiers Afslaers*, counsel for the appellant argued that:

> "[w]hen an applicant institutes review proceedings after what appears *prima facie* to be an unreasonably long delay, this is a point which the Court should not take *mero motu*; the point is one which can only properly be taken by the respondent. The delay as such, and even the possible prejudice to the respondent, does not concern the Court unless the respondent chooses to raise it as an objection *in limine*."[86]

However, the court in *Wolgroeiers Afslaers* reasoned that: "although it is the customary and preferred option to raise said objection as a point *in limine*, it is not compulsory to do so" (own translation).[87] Further, in *Mamabolo v Rustenburg Regional Local Council*,[88] the court found that it may raise the issue of undue delay *mero motu*, but an applicant must be given the opportunity to explain said delay to the court.[89]

In conclusion, the above demonstrates that the common law approach to the time-period within which to launch a review application, involved the "exercise of [a] broader discretion than that traditionally applied to section 7 of PAJA."[90] A court generally enjoyed a discretion, more flexible than the one enjoyed by courts under PAJA.

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[85] Para 33.
[86] 1978 1 SA 13 (A) 17D-F.
[87] 44F-G: "Alhoewel dit gebruiklik en wenslik is om gemelde beswaar *in limine* te opper, is dit nie verpligtend nie." It is not compulsory, as Corbett J reasoned in *Harnaker v Minister of the Interior* 1965 1 SA 372 (K) 385B-D, that: "[w]hile, as I have held, it is competent to raise the defence of delay after *litis contestatio* it is obviously desirable that it should be raised *in initio litis* so that it can be dealt with as a separate peremptory defence before entering into the merits of the matter. This is a matter, however, that can generally be adjusted by a suitable order as to costs".
[88] 2001 1 SA 135 (SCA).
[89] Para 10; see also Hoexter *Administrative law in South Africa* 352.
[90] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 4 SA 331 (CC) para 50.

5 2 2 PAJA

Section 7(1) of PAJA provides the time-period within which a review application must be launched. Section 7(1) provides that:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

In short, section 7(1) requires an applicant to launch the application (a) within a 180 days from the date on which they exhausted (should there be any) available internal remedies, or where there are no internal remedies, (b) within a 180 days from the date on which they either became aware of the administrative action and the reasons for it, or might reasonably have been expected to be aware of the administrative action and the reasons for it.[91] Thus, the linkage within PAJA between the timeframe for bringing an application for review, and the exhaustion of internal remedies, is clear.

While it is accepted that section 7(1) of PAJA is the statutory embodiment of the common law requirement that review proceedings be launched within a reasonable period of time, PAJA's provisions are, nevertheless, "more onerous and more restrictive."[92] This is particularly so, as the 180 day period refers to calendar days, as opposed to business days, implying that it includes Sundays and public holidays.[93]

The Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* ("*Buffalo City*"),[94] referring to the Supreme Court of Appeal decision in *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd*,[95] confirmed that the two-step common law approach to assessing delay[96] applies "up to a point"[97] to section 7(1) of PAJA. It applies "up to a point" because the

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[91] Burns & Henrico *Administrative law* 595; Budlender & Webber "Standing and procedure for judicial review" in *Administrative justice in South Africa* 227-228; Hoexter *Administrative law in South Africa* 534.
[92] Burns & Henrico *Administrative law* 596.
[93] 599.
[94] 2019 4 SA 331 (CC).
[95] 2013 4 All SA 693 (SCA).
[96] See heading 5 2 1 above.
[97] 2019 4 SA 331 (CC) para 49.

method of assessing the delay differs.[98] Should the application for review be launched within 180 days, then the review court will, in line with the first step, enquire as to whether the delay, if any, was unreasonable, and then move on to the second step of the enquiry, should the delay be found unreasonable.[99]

However, a delay exceeding 180 days is "*per se* unreasonable."[100] This implies the absence of the discretion that courts had under the second step of the common law enquiry. In fact, that discretion has been statutorily removed under section 9 of PAJA. A review court is only empowered to hear the review application where the applicant has brought a separate application for condonation of the delay, asking the review court to extend the 180 day period under section 9 of PAJA.[101] This the court may only do if it is in the interest of justice to do so.[102] Only if the court grants the application for condonation, will it take the matter on review.

The rules regarding the time-period within which to launch an application for review has, accordingly, experienced reform under the constitutional era. PAJA imposes a more narrow and onerous procedure, contrary to the more flexible approach that existed under the common law.

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[98] Para 49.

[99] Para 49; see also *Joubert Galpin Searle v Road Accident Fund* 2014 4 SA 148 (ECP), where Plasket J emphasised that review applications launched within 180 days will be found unreasonable only if exceptional circumstances exist. In para 40 he held:
"Section 7(1) talks of applications for review being brought 'without unreasonable delay and not later than 180 days. . .'. Notionally, therefore, it is possible that a delay in launching a review application of less than 180 days after the cause of action arises can be an unreasonable delay but I think that it is fair to say that cases of this sort will be rare and have exceptional characteristics. I say this because in practice, prior to the PAJA coming into force, delays of anything between six and nine months were generally regarded as not being unreasonable and, since the PAJA came into force, the 180-day limit has tended to be regarded as the dividing line between reasonable and unreasonable delay".

[100] 2019 4 SA 331 (CC) para 49.

[101] Para 49; in accordance with s9(1) of PAJA, an extension can be attained either through agreement between the parties, or a court or tribunal granting an application for condonation. This can be seen, for example, in both *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 2 SA 837 (CC) para 1 & 3 and *Van Wyk v Unitas Hospital* 2008 2 SA 472 (CC) paras 1 & 5, where there were separate applications for condonation as required by PAJA.

[102] S9(2) of PAJA; in *Camps Bay Ratepayers' and Residents' Association v Harrison* 2010 2 All SA 519 (SCA) para 54, the court held:
"whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."
In this regard, see also: *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 2 SA 837 (CC) para 3 and *Van Wyk v Unitas Hospital* 2008 2 SA 472 (CC) paras 20 and 22.

5 2 3 Organs of state seeking review of its own decisions

In *Buffalo City*, the Constitutional Court confirmed its decision in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* ("*Gijima*"),[103] that an organ of state seeking review of its *own* decision may not do so under the auspices of PAJA, but must rather launch the application in terms of the principle of legality.[104] The Court in *Gijima* reached this conclusion based on its interpretation of both section 33 of the Constitution and PAJA.[105]

It was the Court's interpretation in *Gijima*, that the Bill of Rights is primarily there "to protect warm-bodied human beings",[106] with its entitlements "primarily"[107] meant to guard against state power.[108] Utilising this as its point of departure, the Court adopted a "very narrow approach"[109] to interpreting section 33 of the Constitution, finding that organs of state are not entitled to the right to just administrative action under section 33(1).[110] Further, due to the obligation on the state under section 33(3) of the Constitution to enact legislation to give effect to the rights under section 33(1) and (2), it was the Court's belief that the state cannot be "both beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights."[111] This implies that only private persons enjoy the rights under section 33, with the state bearing the corresponding obligations under this section.

Accordingly, when an organ of state seeks to review its own decision, it may not rely on PAJA, but must apply for review under the principle of legality. Of course, this raises the fundamental question of what constitutes legality review. Legality review is nothing other than the use of the common law principles applicable to judicial review.[112] Prior to *Gijima*, the principle of legality would be used as a ground of review

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[103] 2018 2 SA 23 (CC).
[104] 2019 4 SA 331 (CC) para 45.
[105] 2018 2 SA 23 (CC) para 18; see also the discussion on this case and its impact, together with critique, in: G Quinot & E van der Sijde "Opening at the close: clarity from the Constitutional Court on the legal cause of action and regulatory framework for an organ of state seeking to review its own decisions?" (2019) 2 *TSAR* 324-336; MN de Beer "A new role for the principle of legality in administrative law: *State Information Technology Agency SOC LTD v Gijima Holdings (Pty) LTD*" (2018) 4 *SALJ* 613-630.
[106] 2018 2 SA 23 (CC) para 18.
[107] Para 18.
[108] Para 18.
[109] Quinot & van der Sijde (2019) *TSAR* 328.
[110] 328; Quinot & van der Sijde criticise this interpretation, believing that it holds little "currency", particularly when it comes to "newer" rights in the Bill of Rights, such as the right just administrative action.
[111] 2018 2 SA 23 (CC) para 27.
[112] See heading 5 2 1 above.

only in circumstances where PAJA did not find application, meaning that the decision or action in question did not qualify as administrative action.[113] In *Bato Star*, the Constitutional Court confirmed that the common law principles may not be relied on instead of PAJA, as that would undermine the "single-system-of-law principle"[114] as enunciated in *Pharmaceutical Manufacturers*.[115] Nevertheless, with its judgment in *Gijima*, the Constitutional Court accepted that there can be:

> "two subsystems of administrative law: one regulatory review framework for persons seeking to review administrative action, and one for organs of state seeking to review their own decisions, even when these two sets of impugned decisions are the very same decisions."[116]

The above implies that the common law rules relating to the time-period within which to launch an application for review, would apply to organs of state seeking to review its own decisions, while private parties seeking review of the exact same decision must rely on PAJA and its rules.

5 2 4 Final Remarks

With the enactment of PAJA, section 7(1) adopted the common law principle that a party seeking review, must launch an application for review within a reasonable period of time. However, contrary to the common law, PAJA provides a strict statutory time-limit of 180 days for doing so (with the possibility of an extension). PAJA thus adopts a more onerous approach to the time-requirement. However, should the party seeking review, be an organ of state wanting to review its own decision, it may not rely on PAJA (*Gijima*), but must rather rely on the principle of legality (common law). This is not applicable to a private party seeking review of a decision, nor to an organ of state seeking review of a decision, other than its own.

5 3 Is there a duty to exhaust internal remedies?

5 3 1 General

Internal remedies (or control) are not to be confused with the form of control exercised by civil courts (external to the administration).[117] An internal remedy

[113] See heading 5 2 1 in chapter 2; Quinot & van der Sijde (2019) *TSAR* 331.
[114] Quinot & van der Sijde (2019) *TSAR* 330.
[115] 2004 4 SA 490 (CC) para 21-22; see also heading 4 above.
[116] Quinot & van der Sijde (2019) *TSAR* 331.
[117] Burns & Henrico *Administrative law* 602.

concerns an appeal, or other forms of control, internal to the particular administration concerned.[118] Generally, a party should first exhaust any available internal remedies before approaching a court to ask for review of administrative action.

Importantly, the discussion that follows below will *neither* attempt to determine what constitutes an internal remedy, *nor* what the content of such an internal remedy should be.[119] Rather, this discussion will merely focus on the fact that the common law does not provide for a strict duty to exhaust internal remedies, while PAJA does provide for a strict duty.

5 3 2 Exhaustion under the common law

Under the common law there is no consensus on whether a duty to exhaust internal remedies exist, despite the compendium of jurisprudence on the subject.[120]

The most important judgment is that of *Shames v South African Railways and Harbour* ("*Shames*").[121] Pretorius asserts that *Shames* can be regarded as the:

> "*locus classicus* regarding the principle that all extrajudicial remedies should be pursued prior to approaching the courts for relief in respect of administrative action."[122]

In this case, the appellant approached the Cape Provincial Division of the Supreme Court, and instituted an action in which he alleged that his dismissal was wrongful.[123] However, the respondent "raised a plea in bar to the effect that the appellant had failed to appeal against his dismissal in the manner provided by the relevant legislation",[124] and as such, was prevented from approaching the court until such time that he had exhausted these available internal statutory remedies.[125] The court upheld the appeal and found that internal remedies must be exhausted prior to approaching a court for judicial review.[126] The *Shames* principle was applied by the Appellate division in *Crisp*

[118] 602; C Plasket "The Exhaustion of Internal Remedies and s7(2) of the Promotion of Administrative Justice Act 3 of 2000" (2002) 119 *SALJ* 50.
[119] For this discussion, see heading 7 below, as well as chapters 5 & 6 of this thesis.
[120] M Wiechers *Administratiefreg* 2 ed (1984) 305.
[121] 1922 AD 228.
[122] DM Pretorius "The Wisdom of Solomon: The Obligation to Exhaust Domestic Remedies in South African Administrative Law" (1999) 116 *SALJ* 113 115.
[123] 115.
[124] 115.
[125] 115.
[126] 1922 AD 228 233: "[…] I am nevertheless of opinion that the defendant is entitled to succeed on his plea in bar on the ground that the plaintiff had not exhausted his remedies under the Act, and that until he had done so, he was precluded from taking these proceedings in a court of law".

v South African Council of the Amalgamated Engineering Union,[127] as well as by the majority (Tindall JA) in *Jockey Club of South Africa v Feldman*.[128]

However, in other cases the courts held that an applicant may, at any stage "of the dispute or where there is uncertainty" (own translation),[129] rely on, and approach the court for, review.[130] In *Welkom Village Management Board v Leteno*,[131] the court quoted with approval a passage from *Golube v Oosthuizen* ("*Golube*"),[132] where De Wet J held that:

> "[t]he mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies."[133]

Thus, the court in both decisions above, was of the opinion that internal remedies need not necessarily be exhausted prior to judicial review. The court in *Durban City Council v Local Road Transportation Board*,[134] adopted a similar approach.

Further, Plasket argues that whether a particular piece of statute should be interpreted to say that the review of a decision should be deferred until such time that the internal remedies under said Act had been exhausted, will primarily depend on two considerations: (a) "whether the internal remedy is effective"; and (b) "whether the alleged unlawfulness has undermined or tainted the internal remedy".[135] He concludes that the courts "are decidedly reluctant to imply an intention to oust or defer their jurisdiction until internal remedies have been exhausted."[136]

Accordingly, dissensus remained, and it was generally accepted that there was not a strict duty under the common law to first exhaust an internal remedy before approaching a review court,[137] despite case law from the appellate division favouring its existence.

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[127] 1930 AD 225; see also the discussion in Pretorius (1999) *SALJ* 120.
[128] 1942 AD 340; see also the discussion in Pretorius (1999) *SALJ* 120-121.
[129] Direct translation from Afrikaans to English. See Wiechers *Administratiefreg* 305.
[130] Wiechers *Administratiefreg* 305.
[131] 1958 1 SA 490 (A).
[132] 1955 3 SA 1 (T).
[133] 1958 1 SA 490 (A) 503A-C.
[134] 1964 3 SA 244 (D) 251D-E.
[135] Plasket (2002) *SALJ* 51.
[136] 51; Hoexter writes that the: "duty is applied sparingly. The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted." See Hoexter *Administrative law in South Africa* 539.
[137] *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* 2010 4 SA 327 (CC) para 34; Hoexter *Adminsitrative law in South Africa* 539; Burns & Henrico *Administrative law* 602-603; J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 466.

5 3 3 Exhaustion under PAJA

Section 7(2) of PAJA regulates the exhaustion of internal remedies in the constitutional era, and holds:

> "(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

Burns asserts that the provisions of section 7(2) are "couched in peremptory language",[138] despite the fact that section 7(2)(c) uses the word "may." Accordingly, in general or where exceptional circumstances are not present, PAJA adopts a strict approach to exhaustion, seeing that a court may not entertain an application for review for as long as the applicant has not first exhausted "all internal remedies."[139] This was confirmed by the Constitutional Court in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd*,[140] when it held that all parties, including the court and administrator in question, are obliged by section 7(2) to exhaust the internal remedy before moving on to review.[141]

However, section 7(2) applies only to "a particular type of internal remedies."[142] Firstly, it must be a remedy provided for in "any other law."[143] This implies that it must be a remedy provided for in statute.[144] Burns argues that should statute expressly provide for an internal remedy, then no court would doubt the existence of such a remedy, and would direct the applicant to first exhaust such remedy.[145] Further, Burns

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[138] Burns & Henrico *Administrative law* 604.
[139] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115; Hoexter *Administrative law in South Africa* 539-540.
[140] 2014 5 SA 138 (CC).
[141] Paras 127-133.
[142] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[143] S7(2)(a) of PAJA.
[144] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115: Quinot concludes that internal remedies created under statutory regulations would also qualify.
[145] Burns & Henrico *Administrative law* 605.

asserts that a problem may arise in the context of where documents provide for "internal dispute resolution mechanisms",[146] yet those documents are not readily available to the public.[147] This argument is of no consequence, as PAJA clearly stipulates that it must be a remedy found in law, rather than in an "empowering provision", which is the broader term used in PAJA to refer to instruments other than those found in law, for example policy documents or agreements. Thus, if it is not a remedy found in statute, it cannot be an internal remedy. Parties cannot, for example, create an internal remedy by inserting a clause into a contract.

Secondly, "the remedy must be internal to the administration"[148] concerned. Accordingly, should a remedy be provided for in statute, but that statute and/or remedy does not concern the administration in question, it is not an internal remedy that the applicant need to exhaust before approaching the court.[149]

Lastly, the internal remedy must be "available to the complainant and be effective."[150] In *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* ("*Koyabe*"),[151] the Constitutional Court held that:

> "[a] remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. An internal remedy must also be readily available and it must be possible to pursue without any obstruction, whether systemic or arising from unwarranted administrative conduct."[152]

Therefore, in this context, the remedy would only be effective if it can provide the complainant with relief akin to the relief provided by a court.[153]

Once an internal remedy meets the above-mentioned criteria, it must be exhausted in accordance with section 7(2)(a) of PAJA. Alternatively, where the applicant has not yet done so, the court must insist on the exhaustion thereof in accordance with section 7(2)(b) of PAJA.

Despite the fact that PAJA adopts a strict approach to the exhaustion of internal remedies, it is still possible to approach a review court directly, should exceptional

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[146] 605.
[147] 605.
[148] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[149] 115; *Reed v Master of the High Court of SA* 2005 2 All SA 429 (E) paras 24-25.
[150] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[151] 2010 4 SA 327 (CC).
[152] Para 44.
[153] Para 44; *Reed v Master of the High Court of SA* paras 20-25; Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.

circumstances exist. This is provided for in section 7(2)(c) of PAJA. While PAJA does not define "exceptional circumstances",[154] Van Heerden JA agreed with the respondents in *Nichol v Registrar of Pension Funds* ("*Nichol*")[155] that exceptional circumstances means:

> "[…] circumstances that are out of the ordinary and that render it inappropriate for the court to require the s7(2)(c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy."[156]

For a review court to recognise such circumstances and allow an exemption, it would have to exercise a "statutory discretion",[157] determining whether exceptional circumstances exist, as well as whether it is in the interest of justice to allow an exemption from section 7(2)(a) of PAJA.[158] In *Van Wyk v Unitas Hospital* ("*Unitas Hospital*"),[159] the Constitutional Court provided the factors to be considered by a court in the exercise of this discretion.[160] They are the same factors the court considers when an applicant applies for condonation[161] of a delay[162] in launching their review application,[163] and are nothing other than the general factors considered in determining whether a decision of the court is in the interest of justice. It is therefore crucial that the applicant shows the existence of these exceptional circumstances, or their application will fail.

Furthermore, one last issue remains before the functionality of section 7(2) can be fully understood, namely: its constitutionality. Some academics view section 7(2) of PAJA as unconstitutional, specifically in light of section 34 of the Constitution, which guarantees a right of access to courts, a right which section 7(2) curtails for as long as internal remedies has not be exhausted.

Plaskett believes that section 7(2) could have the effect of frustrating or curtailing the powers of a court to review administrative action. He argues that the initial bar that

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[154] Hoexter *Administrative law in South Africa* 541.
[155] 2008 1 SA 383 (SCA).
[156] Para 16.
[157] Burns & Henrico *Administrative law* 610.
[158] S7(2)(c) of PAJA; Burns & Henrico *Administrative law* 610; Hoexter *Administrative law in South Africa* 540.
[159] 2008 2 SA 472 (CC).
[160] Para 20.
[161] S9(2) of PAJA.
[162] S7(1)(a) of PAJA.
[163] See heading 5 2 2 above.

section 7(2) places on a party to approach the court, amounts to an infringement on their section 34 rights.[164] He concludes that section 7(2) is "rigid and overbroad and is therefore incapable of justification"[165] under section 36 of the Constitution, the limitation clause.[166] He argues that its "one-size-fits-all approach to internal remedies is arbitrary",[167] and involves the exercise of powers contrary to the rule of law principle.[168]

However, Burns asserts that section 7(2) "does not automatically negate the requirement [that internal remedies be exhausted], since the administration should be afforded [the] opportunity of rectifying its mistakes",[169] and the complainant retains their right to approach the court should the administration not resolve the matter satisfactorily.[170]

Nevertheless, no court has yet invalidated section 7(2) of PAJA, and declared it unconstitutional on the basis that it infringes on section 34 of the Constitution, and thus section 7(2) of PAJA remains in force.

Accordingly, the post-1994 approach to the exhaustion of internal remedies differs from the common law, and, as a general rule, there is now a strict duty under PAJA to exhaust internal remedies prior to approaching a court for review.

5 3 4 What does it mean to "exhaust" an internal remedy?

In spite of the new-found clarity on the subject of exhaustion of internal remedies in the post-1994 era,[171] there is still no clarity on the specific meaning of the term "exhaustion" itself. When a single internal remedy is provided for, then the matter is uncomplicated, seeing that all the applicant for review has to do, is to pursue that specific avenue, and if no relief is obtained, they may approach the court. However, things become problematic where more than one internal remedy exists. Thus, will there, for example, be exhaustion the moment the applicant can show that he/she has pursued one of the available two avenues to him/her, or only once both has been

[164] Plasket (2002) *SALJ* 60.
[165] 62.
[166] 61-62.
[167] 62.
[168] 62.
[169] Burns & Henrico *Administrative law* 611.
[170] 611.
[171] See heading 5 3 3.

pursued? There are a number of possible interpretations, and determining the correctness thereof often seems futile.

However, South African courts have made it abundantly clear what exhaustion does not mean. In *Reed v Master of the High Court of SA* ("*Reed and Others*"),[172] Plasket J stressed that section 7(2) of PAJA places no obligation on a party to:

> "exhaust all possible avenues of redress provided for in the political or administrative system – such as approaching a parliamentary committee or a Member of Parliament, or writing to complain to the superiors of the decision-maker. Similarly, it is not required of an aggrieved person that he or she approach one or more of the Chapter 9 institutions – such as the Public Protector or the Human Rights Commission – prior to resorting to judicial review."[173]

The courts' reasoning was that firstly, "[p]arliament, or one of its committees, or a senior person in the bureaucracy, or a Chapter 9 institution",[174] does not qualify as a so-called public law remedy.[175] Secondly, unlike the courts, "these bodies do not have jurisdiction, as a matter of law, to remedy the complaint"[176] through the issuing of binding orders.[177] In short, such remedies are not deemed internal to an administration.[178]

Further, in *Koyabe*, the Constitutional Court held that "the mere lapsing of the time-period for exercising an internal remedy on its own would not satisfy the duty to exhaust nor would it constitute exceptional circumstances."[179] The Court reasoned that the endorsement of a different interpretation would allow someone to "simply wait out the specified time-period and proceed to initiate judicial review",[180] and serve to "undermine the rationale and purpose of"[181] the duty to exhaust internal remedies. Accordingly, an aggrieved party must take reasonable steps to exhaust available

[172] 2005 2 All SA 429 (E).
[173] Para 20.
[174] Para 21.
[175] Para 21.
[176] Para 21.
[177] Para 21.
[178] See heading 2 2 & 5 2 3 in chapter 2, on the notion that administrative law forms part of public law, as well as for the fact that this thesis is specifically concerned with the public administration.
[179] 2010 4 SA 327 (CC) para 47; see also *Nichol v Registrar of Pension Funds* para 32 with regards to exceptional circumstances.
[180] 2010 4 SA 327 (CC) para 47.
[181] Para 47.

internal remedies, with the aim of securing appropriate redress from the administration in question.[182]

Nevertheless, the continued emphasis by courts and academics on the need to exhaust *all* internal remedies creates the impression that an aggrieved party would only be successful with their application for review, once *all* possible avenues of internal redress have been pursued. As mentioned above,[183] Pretorius saw the 1922 *Shames* decision, as the *local classicus* that "*all* extrajudicial remedies should be pursued"[184] (emphasis added). In *Koyabe*, the Constitutional Court noted that section 7(2) requires the exhaustion of *all* internal remedies.[185] At the same time, Quinot wrote that PAJA "adopts a strict stance in section 7(2) that a court may not entertain an application for judicial review as long as *all* internal remedies have not been exhausted"[186] (emphasis added). Similar to Quinot, Burns also wrote that a court or tribunal must direct an applicant to first exhaust internal remedies "[where] a court or tribunal is not completely satisfied that *any or all* of the internal remedies have been exhausted […]."[187] (emphasis added).

In light of the above, clarity is required. To achieve this, reliance must be placed on both examples in case law and my own interpretation.[188] I will argue that different scenarios require different interpretations.

In *Koyabe*, for example, the Constitutional Court had to consider an appeal against a High Court judgment, which had denied the applicants' request for judicial review of a decision by the Department of Home Affairs withdrawing their permanent residence permits and status.[189] The three applicants were all Kenyan nationals. The Court noted that section 8 of the Immigration Act 13 of 2002 ("Immigration Act") provides "two channels for review."[190] The first, section 8(1), provides a person, either refused entry into the country or found to be an illegal foreigner,[191] with "a direct route to the

[182] Para 47.
[183] See heading 5 3 2 above.
[184] Pretorius (1999) *SALJ* 115.
[185] 2010 4 SA 327 (CC) para 46.
[186] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[187] Burns & Henrico *Administrative law* 606.
[188] Please note that the examples used where chosen merely to illustrate a point. There are other examples as well.
[189] 2010 4 SA 327 (CC) para 1 & 16.
[190] Para 51.
[191] Para 51.

Minister"[192] who reviews the decision taken by an immigration officer. The second, section 8(4), applies in all other circumstances and allows a person whose rights were materially and adversely affected by a decision, "to request a review or appeal to the Director-General"[193] within 10 working days. It is then possible to, "[w]ithin a further 10 days of the receipt of the Director-General's decision",[194] seek a ministerial review or appeal.[195]

It was the opinion of the Court that the section 8(1) procedure applied to the particular facts of the case, not section 8(4), and the remainder of the judgment dealt with the interplay between this provision and those of PAJA.[196] What was not, however, clarified by the Court was whether, had it been section 8(4) that was applicable, the applicants would have been required to utilise both avenues in that procedure (review or appeal to the Director-General and subsequently seeking ministerial review or appeal), before it could be said that there was exhaustion of internal remedies.

Similar to section 8(4) above, section 49 of the National Heritage Resources Act 25 of 1999 ("National Heritage Resources Act"), also provides two internal mechanisms. Together, sections 49(1) and (2) provide for a so-called double appeal procedure. An aggrieved party may (a) appeal against a decision of a committee or delegated South African Heritage Resources Agency ("SAHRA") representative to either the SAHRA council or a provincial heritage resources council.[197] Should the aggrieved party's appeal fail, they (b) obtain the right of a second appeal to the Minister or provincial MEC, against the decision of the SAHRA council/provincial heritage resources council.[198]

Again, no court has yet pronounced on whether an aggrieved party would have to pursue both avenues to meet the criteria for exhaustion. Nevertheless, it is my opinion that in the context of section 49 of the National Heritage Resources Act and section

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[192] Para 53.
[193] Para 52.
[194] Para 52.
[195] Para 52.
[196] Para 55.
[197] S49(1): "Regulations by the Minister and the MEC must provide for a system of appeal to the SAHRA Council or a provincial heritage resources council against a decision of a committee or other delegated representative of SAHRA or a provincial heritage resources authority".
[198] S49(2): "Anybody wishing to appeal against a decision of the SAHRA Council or the council of a provincial heritage resources authority must notify the Minister or MEC in writing within 30 days. The Minister or MEC shall then appoint an independent tribunal, consisting of three experts, having expertise regarding the matter".

8(4) of the Immigration Act, the proper interpretation of the word "all", for the purposes of PAJA, would mean the pursuit of both avenues before there can be said to be exhaustion.

However, the same interpretation cannot be applied, in the procurement context, to section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("Systems Act"), which runs parallel with the mechanism provided for in regulation 49 of the Local Government: Municipal Finance Management Act, 2003 Municipal Supply Chain Management Regulations ("Supply Chain Management Regulations").[199] [200]

Section 62 of the Systems Act holds:

> "A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager *within 21 days* of the date of the notification of the decision" (emphasis added).

Concurrently, regulation 49 of the Supply Chain Management Regulations provides:

> "The supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge *within 14 days* of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action" (emphasis added).

In both these provisions, mechanisms exist with which the administration concerned can deal with a matter internally. Nevertheless, they have different time-periods within which they must be utilised. It is my opinion that this cannot be a case where the word "all", for the purposes of PAJA, can mean that an aggrieved party must pursue both avenues before there could be exhaustion. Such an interpretation would allow for conflict between the two provisions, seeing that an applicant might pursue the regulation 49 avenue, and after 14 days launch an application for review, just for the municipality to argue that the 21 day period under section 62 has not yet lapsed and that internal remedies has not yet been exhausted. Thus, it must rather be the utilisation of the one or the other.

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[199] GN R 868 in *GG* 27636 of 30-05-2005.

[200] Whether s62 and reg 49 actually qualify as internal remedies will be discussed in chapter 5 of this thesis. See heading 1 3 3 in chapter 1.

In conclusion, there appears to be clarity on what is generally meant by the term "exhaustion." However, uncertainty remains with regards to the link between the words "all" and "exhaustion." While the courts must yet provide clarity in this regard, it is my interpretation that what is meant by the exhaustion of "any and all" internal remedies, where more than one exist, will heavily depend on the context of the particular matter in question.

5 3 5 The impact of Gijima on the exhaustion of internal remedies

The Constitutional Court confirmed in *Gijima* that an organ of state seeking review of its own decision may not do so under the auspices of PAJA, but must rather launch the application for review in terms of the principle of legality.[201] However, this is not applicable to a private party seeking review of a decision, nor to an organ of state seeking review of a decision, other than its own.[202]

The Courts' judgment raises a number of questions, at this time still unanswered, for the exhaustion of internal remedies. This is particularly true where an aggrieved party raises a complaint with regards to a decision of an organ of state and wants to utilise an internal remedy, yet the organ of state simultaneously reconsiders its own decision, agrees with the aggrieved party's objection, and wants to seek review of its own decision. Does the aggrieved party retain the right to first exhaust an available internal remedy, or does one immediately go over to legality review? As of yet, there is no answer.

Another point of concern is the *functus officio* doctrine, or so-called principle of finality. The doctrine provides that:

> "a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter."[203]

Accordingly, once a decision has been taken, it is both "final and conclusive",[204] and may not be "revoked or varied by the decision-maker."[205] That being said, Pretorius does note that the rule is not absolute, and that variations are permitted in certain

[201] See heading 5 2 3 above.
[202] This is the primary focus of this thesis. The discussion on *Gijima* is given to provide a greater understanding of the exhaustion of internal remedies as a whole.
[203] DM Pretorius "The origins of the functus officio doctrine, with specific reference to its application in administrative law" (2005) 122 *SALJ* 832 832.
[204] 832.
[205] 832.

circumstances, but that this power is exercised very sparingly, seeing that public policy demands finality in litigation.[206]

These same considerations apply to administrative law, with the doctrine holding that:

> "an administrative agency which has finally performed all its statutory functions or duties in relation to a particular matter subject to its decision-making jurisdiction has exhausted its powers and has discharged its mandate in relation to that matter."[207]

The promotion of certainty is well entrenched in public law, and it has often been said that the "rule of law doctrine rests upon the principle of legal certainty",[208] which is one of the founding values in the Constitution.[209] This implies that, similar to litigation, there must be a point at which an administrative decision/action can be deemed both final and conclusive.

However, the procurement context seems to provide a stumbling block in this regard, one which is necessary to consider in relation to both internal remedies, as well as in the *Gijima* judgment.

On 8 August 2010, the North Gauteng High Court delivered judgment in *Azola Recruitment Solutions CC v National Energy Regulator of South Africa* ("*Azola*").[210] In this case, the applicant tendered to perform recruitment and selection processes for the first respondent.[211] The bid document required bids to be submitted on or before a certain date and time.[212] The applicant's bid was submitted fifteen minutes after the cut-off time, but was considered due to a system error.[213] Further, their bid was deemed highly successful, and the tender was subsequently awarded to them.[214] The bid document stipulated that the award made by the second respondent, the Bid Adjudication Committee, would be final.[215] However, sometime later, the second respondent discovered the system error, informed the first respondent thereof and

[206] 832-833.
[207] 833.
[208] 833.
[209] S1 of the Constitution.
[210] 2010 JDR 1207 (GNP).
[211] Para 2.
[212] Para 2.
[213] Paras 2-4.
[214] Paras 2-4.
[215] Para 2.

advised that the award be withdrawn and the contract be cancelled.[216] The first respondent proceeded accordingly.[217]

The applicant approached the High Court for review, contending that the first respondent was *functus officio* and "not entitled to revoke its decision."[218] In the alternative, if the tender could be revoked, only the second respondent was entitled to make such a decision.[219]

The court took as its point of departure the fact that the first respondent was an organ of state, duly acting under the Public Finance Management Act 1 of 1999 ("PFMA"). The PFMA provides that the CEO of the first respondent serves as the accounting officer thereof. Section 56(1) of the PFMA "grants to such an accounting officer the power to delegate functions or to instruct officials to perform duties assigned to the accounting authority."[220] The court was of the opinion that a decision to establish a Bid Adjudication Committee, as well as entrusting it with the powers to take final decisions, is done in terms of such delegated powers.[221] Lastly, while this would ordinarily imply that the Bid Adjudication Committee's decision should be final, section 56(3) of the PFMA provides that the accounting authority "may confirm, vary or revoke any decision taken by an official as a result of a delegation or instructions in terms of subsection (1)." The court emphasised that the justification for section 56(3) is that organs of state are public entities, and accordingly are accountable to the public due to the utilisation of public resources.[222] Thus, a CEO or accounting authority must be able to act where it is necessary to ensure compliance with the law. This, the court believed, meant that the first respondent was not *functus officio* at the time the tender award was revoked, and the first respondent had the "express authority to effect such a revocation."[223]

The implication of this judgment is that where an administrator with original statutory decision-making powers delegates those powers under a standard delegation provision, he/she retains those powers. The administrator is not divested thereof. It is

[216] Para 5.
[217] Para 5.
[218] Para 6.
[219] Para 6.
[220] Para 11.
[221] Para 11.
[222] Para 12.
[223] Para 13.

therefore possible for the administrator to overrule the decision taken by those to whom the powers were originally delegated.

This judgment now raises an important question in relation to *Gijima*, namely, whether a standard delegation provision such as the one in the *Azola* case, can serve as an internal remedy?[224] The assumption being, that an organ of state has taken a particular decision, and an aggrieved party has raised a complaint in relation to said decision. It is unclear what would happen if the organ of state agrees, wants to review its own decision, but then decides to let the administrator with original decision-maker power overturn the decision, instead of approaching the court for legality review in accordance with *Gijima*. In other words, instead of approaching the court, the organ of state determines that the decision was made by a committee or person to whom powers was originally delegated, and thus the administrator argues that due to him/her retaining their original decision-making powers, the decision is not *functus officio* and overturns the decision.

Would the above not amount to an internal remedy that is being utilised? What implication would this have for the principle of finality? Does this amount to an additional power now vested in organs of state?

This thesis can certainly not within its scope attempt to provide an answer to these questions, especially when its focus falls primarily on the impact of internal remedies for use by private parties, not organs of state. Nevertheless, their relevance to the future of both judicial review and the exhaustion of internal remedies cannot be underestimated.

6 The absence of a uniform system of internal controls

This chapter has showed that there is a distinct relationship between judicial review and internal remedies.[225] In accordance with both PAJA and case law, a party must first exhaust any and all available internal remedies before approaching a court to ask for review of administrative action. The argument often advanced in favour of this duty, is that there is a need for "an integrated system of regulation of administrative action",[226] a system that equips the public administration to, as far as possible, correct

[224] Please note that the focus here is not yet on what qualifies as an internal remedy, nor what is to be considered the content and formulation of an effective internal remedy. The focus here is merely on stating a question that might be of relevance to the remainder of the thesis.
[225] See also: Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[226] 115.

its own mistakes. This was confirmed by the Constitutional Court in *Koyabe*, where it held:

> "approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution."[227]

Accordingly, the administration is often deemed to be in a better position than the courts to assess and correct its own mistakes, especially when the administration has the necessary expertise to deal with the matter, which the court may lack.

Despite the specific wording of section 7(2) of PAJA, as well as the continued emphasis by the courts on the utilisation and exhaustion of internal remedies, there is still no uniform system of internal controls (or remedies) in South Africa.[228] An aggrieved party has no right to an internal remedy, nor is there an obligation on "a particular part of the administration to have internal remedies"[229] in place. During the drafting of PAJA, the possibility of establishing a more "coherent and uniform system of internal remedies was considered."[230] In fact, section 10(2)(a)(ii) provides that:

> "[t]he Minister may make regulations relating to the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and the judicial review by courts or tribunals of administrative action."

Thus, the establishment of a uniform system of internal controls was left to the discretion of the Minister of Justice, which, to date, has not exercised that discretion.

The implication of this is that where statute provides for an internal remedy, the aggrieved party must exhaust it prior to approaching a court for review,[231] or where they approach the court first, the court must direct them to first exhaust the remedy.[232]

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[227] 2010 4 SA 327 (CC) para 36.
[228] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 100.
[229] 100.
[230] 101.
[231] S7(2)(a) of PAJA.
[232] S7(2)(b) of PAJA.

But, where no such internal remedy is provided for in statute or the regulations that apply to the administration concerned, the aggrieved party has no right to demand that they be provided with one, nor is there an obligation on the administration in question to provide it.

The absence of such a uniform system of internal controls constitutes an integral part of this thesis, and it shall be argued going forward that such a system must be both established and implemented.[233]

7 Conclusion

With the enactment of section 33 of the Constitution, the right to just administrative action became a constitutionally recognised right. An aggrieved party has the right to approach a High Court (or designated Magistrate's Court) and ask for review of administrative action. However, contrary to the common law, PAJA now places an obligation on such an aggrieved party to first exhaust any and all available internal remedies. Should the applicant fail to do so, there is a duty on the court to direct them to first exhaust the internal remedy. Further, it is now an established principle that organs of state seeking to review its own decisions are not beneficiaries of the rights encapsulated in section 33 of the Constitution, but must rather rely on legality review. South African law therefore draws a distinction between a private party seeking review of administrative action (which is the focus of this thesis), and organs of state wanting to review its own decisions.

However, South Africa is yet to implement a uniform system of internal controls, enabling South Africans from all backgrounds to approach the administration concerned and demand that it either provide clarity on its decision, or correct one made in error. While courts continue to emphasise the strict duty to exhaust internal remedies where they are provided, there is no similarly enforceable obligation on the state to actually provide an aggrieved party with an internal remedy. Only if there is one, need it be exhausted, otherwise the only option is to approach a High Court, generally the court of first instance for judicial review, and ask the court to review the administrations' decision.

What this chapter has, however, not yet addressed, is what constitutes an internal remedy (its content and formulation)? The answer to this question will only be provided

[233] See chapter 4.

in chapters 5 and 6 of this thesis. This will not be done in chapter 4 that follows below. Rather, the aim of chapter 4 is to set out the argument in favour of an obligation on the state to provide both a uniform system of internal controls, together with a right for an aggrieved party to a have an internal remedy.

The reasoning behind this methodology is that one now knows the position regarding the exhaustion of internal remedies in terms of section 7(2) of PAJA,[234] together with the importance of accountability as a concept applicable to the public administration as a whole.[235] Therefore, the following issue will be to consider the argument for why there is a need for internal remedies within the South African judicial system,[236] where after one would then investigate what these internal remedies must actually consist of in order to enable a more open and accountable public administration.[237]

[234] See chapter 3.
[235] See chapter 2.
[236] See chapter 4.
[237] See chapter 5 & 6.

Chapter 4: Empowerment – The missing link in Administrative justice

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1 Introduction

In its third decade of democracy, South Africa continues to face enormous challenges on the economic, political and social front. From high unemployment to extreme poverty,[1] as well as staggering levels of corruption[2] and political infighting,[3] South Africa appears to be on the brink of disaster. Almost a decade ago, former Constitutional Court Justice Kate O'Regan stated that:

> "[t]he deep inequalities that persist are visible reminders of the effects of apartheid and colonialism. Until these scars are healed, the vision of our Constitution will not have been achieved. There is a great burden on government, in particular, to address this historic legacy."[4]

Justice O'Regan's remark serves as a stark reminder that South Africa's problems continue to be a combination of both old and new challenges, and that the project of realising a free, equal and transformative society will not be achieved overnight. As I will argue below, it is indeed these challenges that must serve as arguments in favour of a uniform system of internal remedies in South African administrative law.[5]

Chapter 3 of this thesis emphasised that there is no uniform system of internal controls in South Africa, and no enforceable duty against the state to implement such a system.[6] Due to its absence, the South African justice system remains inaccessible for the majority of South Africans due to the high costs, prolonged time periods and technical nature thereof. If the possibility existed to approach the public administration directly, and have it correct or review its own administrative actions or decisions, instead of approaching the High Court (or designated Magistrate`s Court) for the review of such a decision or action, then the justice system would be more open and accessible, and the public administration more accountable.

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[1] L Chutel "Post-apartheid South Africa is failing the very people it liberated" (25-08-2017) *Quartz Africa* <https://qz.com/africa/1061461/post-apartheid-south-africa-is-failing-the-very-people-it-liberated/> (accessed 09-02-2019); Anonymous "Poverty on the rise in South Africa" (22-08-2017) *StatsSA* <http://www.statssa.gov.za/?p=10334> (accessed 09-02-2019); see heading 4 4 below.

[2] W Gumede "Why corruption killed dreams of a better South Africa" (19-10-2019) *Wits School of Governance* <https://www.wits.ac.za/news/latest-news/opinion/2019/2019-09/why-corruption-killed-dreams-of-a-better-south-africa.html> (accessed 30-11-2019).

[3] Anonymous "Too much infighting, instead of fixing SA: Citizens rebuke leaders" (11-07-2019) *TIMESLIVE* <https://www.timeslive.co.za/politics/2019-07-11-too-much-infighting-instead-of-fixing-sa-citizens-rebuke-leaders/> (accessed 30-11-2019).

[4] A Kemmerer "Taking Integrity Seriously: Justice Kate O'Regan on the Constitutional Court in South Africa" (24-11-2011) *Verfassungsblog On Matters Constitutional* <https://verfassungsblog.de/integrity-justice-kate-oregan-constitutional-court-south-africa-2/> (accessed 01-11-2019).

[5] See heading 4 below.

[6] See heading 6 in chapter 3.

Thus, this chapter will set out the rationale behind the creation and implementation of a duty on the state to provide for a uniform system of internal controls. It is no longer sustainable to have the courts enforce the rule that an internal remedy should be exhausted, only if and when it exists. Rather, together with section 7(2) of PAJA that requires the exhaustion of internal remedies, there should be a similarly enforceable duty on the state to provide the public with internal remedies, and allow the public administration to deal with its own decisions and actions on a first hand basis.

In principle, this would ensure that those living below the poverty line, will be able to access justice, as well as ensure that the project of Transformative Constitutionalism is realised.

The argument in favour of such a uniform system of internal controls will be set out by firstly, emphasising the need for an accountable public administration. Secondly, the effect of the dual nature of administrative law will be considered, and lastly, the rationale behind the implementation of such a uniform system will be presented at the hand of four main points.

2 The public administration and its accountability

Chapter 2 emphasised that the primary focus of this thesis falls on the public administration. A subdivision of the executive arm of government, the public administration (which has no set definition),[7] is concerned only with the implementation of legislation and policy.[8] Thus, it is for the personnel in the public administration to implement, and carry out, the will of the executive on a daily basis. Accordingly, the public administration is the component of the state machinery that citizens come into contact with most frequently. It is for this reason that chapter 2 emphasised that the public administration is regulated by section 195 of the Constitution, and that it is subject to both the *Batho Pele* principles, as well as the Public Service Commission.[9]

When studying section 195 of the Constitution, as well as jurisprudence, the one constitutional value of the public administration that is continually emphasised, is its

[7] MP Ferreira-Snyman "Demokrasie en die openbare administrasie" (2005) 45 *Tydskrif vir Geesteswetenskappe* 79 79.
[8] See heading 5 2 3 in chapter 2.
[9] See heading 5 2 3 in chapter 2.

accountability to the broader public.[10] In *President of the Republic of South Africa v South African Rugby Football Union* ("*SARFU*"),[11] the Constitutional Court held that:

> "[t]he Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated."[12]

This continued emphasis can be explained in light of South Africa's past, and the general disregard for rights during the Apartheid era.[13]

However, chapter 2[14] highlighted that an over-emphasis of this component can lead to an under-performing and stifled public administration. The Constitutional Court in *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal*,[15] held that:

> "[a]s a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly."[16]

This is further supported by Cora Hoexter, who holds that:

> "administrative law ought to facilitate creative decision-making in the public interest, but at the same time permit the effective assertion of citizens' rights and limit any abuses of public power."[17]

Thus, there is a general consensus among the courts and academics that the efficiency of the public administration could not be sacrificed in order to realise the dream of an open, transparent and accountable public administration. Rather, there would need to be a balance between the two. Yet, the question is how one is to achieve that balance?

According to Cora Hoexter, the hope was that PAJA would provide for an integrated system of administrative law, enabling a more "balanced approach to judicial

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[10] S195(1)(f) of the Constitution: "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: Public administration must be accountable".
[11] 2000 1 SA 1 (CC).
[12] Para 133.
[13] Para 133, see also heading 5 3 1 in chapter 2.
[14] See heading 5 3 1 in chapter 2.
[15] 1999 2 SA 91 (CC).
[16] Para 41.
[17] C Hoexter "The current state of South African administrative law" in H Corder & L Van der Vijver (eds) *Administrative justice* (2002) 21 27. See also heading 5 3 1 in chapter 2.

intervention."[18] Yet, PAJA failed in this endeavour, and ended up enforcing the primacy of judicial review instead.[19] Hoexter was at pains to stress that PAJA did not address "the perfect rival to judicial review", namely "the opportunity to have a decision reconsidered by the administration itself."[20]

Therefore, this thesis argues that internal remedies could provide the means with which to counter the continued emphasis of judicial review, and ensure the realisation of a more integrated system of administrative law in South Africa. Internal remedies will be able to strike a more appropriate balance between accountability and efficiency.[21] However, the dual nature of administrative law may pose as a stumbling block to the realisation of a uniform system of internal remedies.

The meaning and implication of this concept will be addressed below.

3 The dual nature of administrative law

Administrative law aims to achieve two objectives simultaneously. It aims to restrict public power, on the one hand, and to "enable and facilitate the exercise of public power",[22] on the other.[23] The former amounts to the exercise of control over the administration, while the latter is the empowerment of the administration.[24] While the two aims appear to stand in opposition to one another, they are not necessarily mutually exclusive.[25]

Administrative law's function is to determine how a statutory provision or administrative power may be understood, implying that the above two components link with lawfulness, a core principle of administrative law. Lawfulness implies that an administrator must function within the parameters of an empowering provision.[26] Thus, administrators are empowered to do what is provided for in the provision (empowerment), but simultaneously restricted, as they may not exceed the limits of the powers conferred within the provision (control).[27]

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[18] C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 484. See also heading 5 3 2 in chapter 2.
[19] See heading 5 3 2 in chapter 2.
[20] Hoexter (2000) *SALJ* 497. See also heading 5 3 2 in chapter 2.
[21] See heading 5 3 2 in chapter 2.
[22] P Maree "Administrative authorities in legal context" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 27 58.
[23] 58.
[24] 58.
[25] 58.
[26] 58.
[27] 58-59.

Harlow and Rawlings provided an extensive analyses on the dual nature of administrative law, with a specific focus on the so-called "red light" and "green light" theories of administrative law.[28]

According to the red light theory, the "primary function of administrative law should be to control excesses of state power and, more precisely, subject it to the rule of the law courts."[29] Harlow and Rawlings noted that it is "light-heartedly"[30] referred to as the red light theory due to its continued emphasis on control. In short, red light theorists:

> "believed that law was autonomous to and superior over politics; that the administrative state was dangerous and should be kept in check by law; that the preferred way of doing this was through adjudication; and that the goal should be to enhance liberty, conceived in terms of the absence of external constraints."[31]

However, post-World War II, the green light theory began to develop, viewing administrative law as a "vehicle for political progress"[32] and welcomed the establishment of the administrative state.[33] Green light theorists believed:

> "that law was not autonomous from politics; that the administrative state was not a necessary evil, but a positive attribute to be welcomed; that administrative law should seek not merely to stop bad administrative practice, and that there might be better ways to achieve this than adjudication; and that the goal was to enhance individual and collective liberty conceived in positive and not just negative terms."[34]

Thus, green light theorists "viewed the legal profession as too old-fashioned to reform itself."[35] Rather, focus had to be on "alternatives to the court."[36]

Accordingly, if the above is applied to administrative law more generally, there are two sides attempting to form one component. On the one side, there is *empowerment* (or facilitation), the component of administrative law which provides the administrator with the manner in which he or she must go about the exercise of their powers. On the other side is *control*, the component which enables an affected party to review an administrative decision. The red light theory emphasises that control must occur primarily through the courts, while the green light theory seeks to consider alternatives

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[28] C Harlow & R Rawlings *Law and Administration* 3 ed (2009) 23.
[29] 23.
[30] 23.
[31] 44.
[32] 31.
[33] 31.
[34] 44.
[35] 36.
[36] 36.

to judicial intervention, alternatives that could enable the administration to exercise greater power over the review of its decisions and actions. The different approaches of these theories speak to the fact that there remains a gap between empowerment and control, a gap that persists in spite of the fact that empowerment and control attempts to form one component and function simultaneously.

I argue that internal remedies present the opportunity to bridge the above-mentioned gap, and ensure that empowerment and control function simultaneously to ensure that there is a viable alternative to judicial review.

Instead of arguing that certain aspects of administrative law fulfil a pertinent facilitation purpose, while others fulfil a more controlling purpose, one can argue that internal remedies can achieve both. Internal remedies allows for control over the public administration, but does so in way that nevertheless allows the administration to reach the correct decision on its own, without having recourse to the courts. Thus, internal remedies are a way to bring together the two sides of the coin.

However, as was emphasised in chapter 3, South Africa lacks a uniform system of internal controls, and there is no enforceable duty against the state to implement such a system.[37] The general rule is that if and when an internal remedy exists, an aggrieved party must first exhaust such internal remedy before approaching a court for review.[38] Where no internal remedy is provided for, an aggrieved party must approach the courts for judicial review.

This means that in the context of internal remedies, section 7 of PAJA, and in particular section 7(2), only provides for the control component, but not that of empowerment. With judicial review maintaining its primacy, the public administration's ability to deal with administrative matters remains constrained. The courts have often reiterated that it may lack the necessary expertise of the public administration to deal with certain matters.[39] In this regard, the courts have often emphasised that the public administration is better suited to deal with matters of an administrative nature. However, at the moment the public administration can only deal with the review of its administrative matters directly if an internal remedy exists. In its absence, it is for the courts to review the matter.

[37] See heading 6 in chapter 3.
[38] See heading 6 in chapter 3.
[39] See heading 6 in chapter 3.

It is therefore paramount that South Africa implements a uniform system of internal remedies that can function jointly with the exhaustion of internal remedies under section 7(2) of PAJA. This will empower the public administration to deal with parties aggrieved by its decisions or actions directly, but still restrict the exercise of power in the sense that the public administration has to remain open, accessible and accountable, as it must ensure the transparency of its procedures to the broader public throughout.

There are a number of arguments that serve to underscore the need to empower the public administration. The rationale for the implementation of a uniform system of internal remedies is accordingly discussed below.

4 The rationale behind a duty for the state to provide a uniform system of internal remedies

4 1 Introduction

The argument in favour of a duty on the state to implement a uniform system of internal controls rests primarily on four points, discussed below, namely: (a) section 33(3) of the Constitution; (b) the realisation of the vision of Transformative Constitutionalism; (c) lack of access to justice due to high unemployment and poverty; and (d) the exhaustion of domestic remedies under international law.

4 2 Section 33(3) of the Constitution

Section 33 of the Constitution lies at the heart of realising the right to administrative justice. In general, this provision provides that everyone has a right to just administrative action, which is lawful, reasonable and procedurally fair.[40] In particular, section 33(3) holds that:

> "(3) National legislation must be enacted to give effect to these rights, and must
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration."

Section 33(3)(a) recognises that review does not have to occur by means of the courts, and section 33(3)(c) simultaneously recognises that the public administration

[40] S33(1) of the Constitution.

must function as efficiently as possible. The need for an efficient administration is emphasised in section 195 of the Constitution as well, and is subject to both the principles of *Batho Pele*, as well as the Public Service Commission.[41]

Thus, section 33(3) provides the basic structure for legislation to comply with the right to administrative justice. The fact that the efficiency of the administration is emphasised, together with methods other than judicial review, is a further argument in favour of the implementation of a system of internal remedies. It will allow the public administration to take decisions or implement actions, but nevertheless remain accountable. The public administration will be able to reconsider a decision or action and correct it where necessary, without having to involve the judiciary. This allows for the creation of a bridge between the empowerment and control objectives of administrative law,[42] and the establishment of a truly efficient and accountable public administration. Accordingly, a direct link can be made between the dual nature of administrative law and section 33(3) of the Constitution.

This argument is further supported by the realisation of the project of Transformative Constitutionalism, together with current unemployment and poverty figures, as well as international law.

4 3 Transformative Constitutionalism and administrative justice

The Interim Constitution, and its successor, the Constitution, signalled the end of Apartheid South Africa, and the beginning of a democratic and constitutional state.[43] The Constitution Preamble holds that the 1996 Constitution is adopted in order to:

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[41] See heading 2 above, as well as heading 5 2 3 in chapter 2.

[42] See heading 3 above.

[43] Preamble of the Interim Constitution:

> "We, the people of South Africa declare that-
> WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms […]."

Post-amble of the Interim Constitution – "National Unity and Reconciliation":

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex […]."

Preamble of the 1996 Constitution:

> "We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity. […]".

> "[…] [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [and] [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law […]."

However, almost three decades later, the dream of realising a constitutional state based on the rule of law and an accountable government seems distant and unreachable.

Nevertheless, in the last 30 years, much has been written about the so-called project of Transformative Constitutionalism, and its contribution to realising the vision of the Constitution. But what is Transformative Constitutionalism, and what can it add to this debate regarding, specifically, the public administration's accountability?

The leading paper regarding the definition, as well as importance of, Transformative Constitutionalism, was authored by Professor Karl Klare in 1998,[44] and is continuously referenced by all academics who contribute to the topic.[45] Klare envisions Transformative Constitutionalism as a:

> "long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[46]

Klare argues that it is something which cannot quite be captured in the word "reform",[47] yet stops just short of a "revolution."[48]

Put differently, former Chief Justice Pius Langa opined that Transformative Constitutionalism includes "the pursuit of some form of economic transformation and a change in legal culture."[49] Accordingly, Justice Langa held that transformation is an ongoing process which recognises that there is value in that ever-present process

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[44] K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146.
[45] See for example: J Brickhill & Y Van Leeve "Transformative Constitutionalism – Guiding light or empty slogan?" (2015) *Acta Juridica* 141 142; C Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative law" (2008) 24 *SAJHR* 281 285; M Pieterse "What Do We Mean When We Talk about Transformative Constitutionalism?" (2005) 20 *SAPL* 155 155.
[46] Klare (1998) *SAJHR* 150.
[47] 150.
[48] 150.
[49] Please note that this is not a direct quote from the work of Langa CJ himself, but rather a summarised version of his argument as presented by Brickhill & Van Leeve. See Brickhill & Van Leeve (2015) *Acta Juridica* 142. Accordingly, see: P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351.

itself.[50] It envisions a "meaningful improvement of the material conditions of people's lives together with a real change in legal culture."[51]

Thus, it would appear that Transformative Constitutionalism envisages that the legal culture of South Africa must change, which implies that the Constitution itself should be central to any and all decisions, whether taken by the judiciary or those serving in the executive.

Considering the above, it is important to note that there are four aspects of transformation that can be found within the Constitution.[52] They are: (a) the realisation of substantive equality;[53] (b) the achievement of social justice;[54] (c) the introduction and implementation of human rights standards;[55] and lastly, (d) the "promotion of a culture of justification in public-law interactions."[56] In light of the fact that the work of the public administration involves administrative action which amount to public-law interactions, the focus of this thesis falls specifically on the last-mentioned feature.

Yet, a relevant question in this context is how the public administration is going to create and enforce such a culture of justification?

The Constitution preamble[57] clearly establishes that the Final Constitution signals a decisive break from South Africa's Apartheid past, in order to enable a shift from a culture of authority to a culture of justification. This implies that the Constitution expects all institutions which are created by it, to adopt and foster this culture of justification as well. The impact of this development, specifically for the public administration, is a two-way street. Meaning, it is not just for members of the public to expect that the public administration should justify why it made a specific decision, or took a certain action. Rather, the public administration itself should realise that it should foster and enforce this culture of justification. It must come from within. This is the only way an inherent culture of justification will exist, in which the administration

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[50] Brickhill & Van Leeve (2015) *Acta Juridica* 142.
[51] 143.
[52] See specifically: Hoexter (2008) *SAJHR* 286; Pieterse (2005) *SAPL* 161.
[53] S9(2) of the Constitution.
[54] Ss 26 and 27 of the Constitution.
[55] S1(a) of the Constitution.
[56] Hoexter (2008) *SAJHR* 287, this is most evidently related to s36 of the Constitution. Hoexter highlights that Pieterse refers specifically to the work of Etienne Mureinik in E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31, when expanding on the meaning of the culture of justification in public-law interactions (Pieterse (2005) *SAPL* 161). See: Hoexter (2008) *SAJHR* 287. Further, see also the discussion on "administrative justice" under heading 1 1 in chapter 1.
[57] See quote above.

knows beforehand that it will have to justify its decision or action, and the public simultaneously knows that its request for justification will be met.[58]

But, without mechanisms with which the public administration can create and enforce this culture of justification, this vision will not become a reality. Accordingly, the public administration should be empowered with the tools necessary to achieve the realisation of this culture, and one way with which to provide those tools is through a uniform system of internal remedies.

In the ordinary course of business, section 5 of PAJA provides that when an initial decision is taken by the public administration, and if it does not furnish the affected party (or parties) with reasons of its own accord, it must furnish the relevant party with adequate[59] and written reasons, if so requested within 90 days of the decision having been taken.[60] Should there be no internal remedies in place, then if the affected party aggrieved by said administrative decision or action want it reviewed, he or she may approach a review court.

However, if a uniform system of internal remedies were in place, an aggrieved party would not need to approach a review court, but could rather approach the administration responsible for making the decision, or taking the action, first. Should the decision or action remain the same upon reconsideration, or should it be overturned, the right to request reasons continues to apply, and the administration must justify its decision.

Thus, the right to reasons, together with a system of internal remedies, will enable the public administration to create and enforce a culture of justification which will assist

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[58] The policy of *Batho Pele* establishes a "citizen-orientated approach to service delivery." It should not be seen as a plan, but rather as an "attitude or set of values". Of importance in this context, is specifically principles 5, 6 and 7 *of Batho Pele*, namely: (e) openness and transparency regarding services; (f) remedies for failures and mistakes; and (g) increasing access to services. This reinforces the idea of a culture of justification in the public administration, and links with s195(1)(f) & (g) of the Constitution. See heading 5 2 3 in chapter 2.

[59] In *Commissioner, South African Police Service v Maimela* 2003 5 SA 480 (T), the court explained what would qualify as *adequate* reasons. The court held at 486B:
"Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified."
The court also provided factors to be considered in determining the adequacy of the reasons. At 485H-486B, the court held:
"The adequacy of reasons will depend on a variety of factors, such as the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be 'full written reasons'; the 'briefest pro forma reasons may suffice'".

[60] S5(1) and (2) of PAJA. S5 does not provide for a right to reasons, only the right to request reasons from the public administration.

in the realisation of a public administration which is open, efficient, transparent and accountable. Through these measures, greater effect will be given to the vision of Transformative Constitutionalism, and enable administrative actions to be finalised with greater speed and efficiency, as opposed to judicial review, with its cumbersome nature.[61]

However, it is important to note that there are other benefits to implementing a uniform system of internal remedies as well, and which links with the project of Transformative Constitutionalism. These include increasing access to justice and making review proceedings more affordable.[62] This is discussed below.

4 4 Poverty, and its impact on the achievement of administrative justice

4 4 1 General

On 10 October 2019, the World Bank updated its "overview" of South Africa and its economy, and stated that:

> "South Africa remains a dual economy with one of the highest inequality rates in the world, with a consumption expenditure Gini coefficient of 0.63 in 2015. Inequality has been persistent, having increased from 0.61 in 1996. High inequality is perpetuated by a legacy of exclusion and the nature of economic growth, which is not pro-poor and does not generate sufficient jobs. Inequality in wealth is even higher: the richest 10% of the population held around 71% of net wealth in 2015, while the bottom 60% held 7% of the net wealth. Furthermore, intergenerational mobility is low meaning inequalities are passed down from generation to generation with little change in inequality over time. Not only does South Africa lag its peers on level of inequality and poverty, it lags on the inclusiveness of consumption growth."[63]

This is highly problematic and presents a number of difficulties when it comes to access to justice.

The right of access to courts is guaranteed under section 34 of the Constitution. Yet, despite the recent designation of Magistrate's Courts to hear PAJA matters, review of administrative action remains predominantly a matter dealt with in the High Court.[64] Currently, there are only fourteen provincial High Court divisions,[65] and each

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[61] See heading 4 4 below, for a detailed discussion on both the legal costs and time periods involved in judicial review.
[62] See heading 4 4 below.
[63] Anonymous "South African Overview" (10-10-2019) *The World Bank* <https://www.worldbank.org/en/country/southafrica/overview> (accessed 16-02-2020).
[64] See heading 1 3 1 in chapter 1.
[65] Anonymous (2019) *Department of Justice and Constitutional Development* <http://www.justice.gov.

are located in urban areas (cities or large towns).[66] This constitutes a barrier to access to justice, seeing that some people have to travel great distances to get to the court. Further, the high costs and time-consuming nature of the judicial process, prevents access.[67] It is estimated that, if all procedures are followed and all parties perform their respective responsibilities in a timely manner, a review application could take nine months to be finalised before a court.[68] However, it is a well-known fact that securing access to records held by the government often poses the greatest challenge in review applications.[69] Thus, a more accurate time-line could be anything between twelve to eighteen months, if not longer, from launch of an application to date of judgment by the court.[70]

In light of the above, it is unsurprising that the majority of South Africans continue to struggle to gain access to the justice system. The consideration of current unemployment figures, as well as the nature and monetary value of legal services, may assist in understanding this predicament.

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za/about/sa-courts.html> (accessed 16-02-2019).

[66] Anonymous (04-09-2012) *South African Government Information* <https://web.archive.rg/web /20120904234855/http://www.info.gov.za:80/aboutgovt/justice/courts.ht> (accessed 16-02-2019). It is unclear at this time, whether the use of designated Magistrate's Courts as well, will alleviate the time-consuming nature of, and costs of, legal proceedings.

[67] J Dugard "Courts and the Poor in South Africa: A Critique of Systematic Judicial Failures to Advance Transformative Justice" (2008) 24 *SAJHR* 214 216.

[68] This is merely an estimation based on current practice. There are a number of decisions where the time-line has stretched far beyond this period. See in this regard: *President of the Republic of South Africa v Democratic Alliance* (664/17) 2018 ZASCA 79; *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* 2018 1 SA 200 (SCA).

[69] *President of the Republic of South Africa v Democratic Alliance* (664/17) 2018 ZASCA 79 paras 4-6.

[70] For illustrative purposes, see: *President of the Republic of South Africa v Democratic Alliance* (664/17) 2018 ZASCA 79. The Democratic Alliance launched their review before the High Court on 4 April 2017, yet, due to the matter being appealed, review was only finalised in the Constitutional Court in September 2019; *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government* (231/19) 2020 ZASCA 39 paras 4, 39 and 52-53. In this case, the South Durban Community Environmental Alliance launched a review application in the High Court on 22 July 2016. The High Court heard the application on 13 December 2017, rendered judgment on 19 December 2018 and granted leave to appeal on 12 February 2019. The matter went on appeal to the SCA, which heard the matter 6 March 2020 and rendered judgment on 17 April 2020. Accordingly, the review spanned a period of no less than 4 years. The SCA (para 53) expressed its frustration with the High Court in taking a year to render judgment, holding:

"This Court disapproves of unreasonable delay by judicial officers in delivering judgments. In *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 3 SA 238 (SCA) para 39, Harms JA stated the following: 'The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that Judges are imperious. […]. There rests an ethical duty on Judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted legal aphorism, namely that "justice delayed is justice denied", will become a mere platitude'".

4 4 2 South Africa's current unemployment and poverty figures

By the end of the first quarter of 2020, South Africa's unemployment rate climbed to a record 30.1%.[71] According to the information released by Statistics South Africa, 16.4 million people were employed in the first quarter, while the 30.1% unemployment rate implies that 7.1 million people were unemployed in the first quarter.[72] However, the unemployment rate does not include the 15.4 million people who were not economically active (discouraged work seekers and economically inactive) in the first quarter.[73]

Together with these figures, it is important to consider household income. According to an "Income and Expenditure of Households" study, released at the same time as the 2011 census results (the most recent nation-wide census), the household income for South Africans stood at R119 542 per annum, with it being noticeably lower for black households at R69 632 per annum.[74] Furthermore, 55.5% of the population continue to live below the upper-bound poverty line, which currently stands at R1 227 per person per month.[75] Lastly, and quite shockingly, if one takes home more than R7 300 per month, one falls in the top 10% of South African earners.[76]

These figures illustrate why many cannot afford the high costs of legal fees.

4 4 3 The nature of legal fees

Legal fees may consist out of the combined cost of (a) fixed fees charged by the state to members of the public for allowing them to access public procedures such as filing papers at court; (b) the tariffs put in place by the Rules Board for litigation (which

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[71] Anonymous "Quarterly Labour Force Survey" (23-06-2020) *StatsSA* <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2020.pdf> (accessed 03-07-2020). It previously stood at 29.1% at the end of 2019. See: Anonymous "Quarterly Labour Force Survey" (11-02-2020) *StatsSA* <http://www.statssa.gov.za/?p=12948> (accessed 25-04-2020).
[72] Anonymous "Quarterly Labour Force Survey" *StatsSA*.
[73] Anonymous "Quarterly Labour Force Survey" *StatsSA*.
[74] Anonymous "Income and Expenditure of Households 2010/2011" (06-11-2012) *StatsSA* <http://www.statssa.gov.za/publications/P0100/P01002011.pdf> (accessed 19-12-2019).
[75] Anonymous "How much you need to earn each month to be in the richest 1% in South Africa" (22-09-2019) *BusinessTech* <https://businesstech.co.za/news/wealth/336309/how-much-you-need-to-earn-each-month-to-be-in-the-richest-1-in-south-africa/> (accessed 19-12-2019).
[76] Anonymous "How much you need to earn each month to be in the richest 1% in South Africa" *BusinessTech*; T Head "You can compare your household income to the rest of SA using this tool" (05-07-2018) *The South African* <https://www.thesouthafrican.com/news/household-income-inequality-calculator-sa/> (accessed 19-12-2019).

is subject to taxation); and lastly (c) "the largely unregulated tariffs charged by legal practitioners for transactions and for litigation."[77]

These costs are further combined with the three different scales with which courts award costs upon judgment in a matter. The three scales are: (a) party and party; (b) attorney and client; and (c) attorney and own client costs.

Firstly, party and party costs "are legal costs that a court may order the defendant to pay to the plaintiff in a court case."[78] The implication of this scale is not that the "losing" party will settle all of the costs of the "winning" party. Rather, these costs include the costs specific to the particular matter, and while it may exclude certain costs, the costs are "subject to court tariffs, which are set by law and charged according to fixed scales [which differ between the Magistrate's and High Courts]."[79] This implies that the law firm's own specific costs are ignored, and one focusses solely on the costs as set out in the regulations.[80]

Secondly, attorney and client costs "include party and party costs, as well as other legal costs – including charges for attendances between you and your attorney."[81] In some situations, the court may decide to award attorney and client costs, or a portion thereof, to the successful litigant, however this is seldom done.[82] If attorney and client costs are awarded, it is subject to the same court tariffs as party and party costs.[83]

Lastly, attorney and own client costs "are the actual fees payable by a client to an attorney, in terms of their fee agreement (in which case the hourly rate is not restricted to the statutory Magistrate`s and High Court tariffs). They're not generally awarded by the Courts."[84]

Lastly, upon completion of the matter, the preparation of the bill of costs must take place, as well as a process known as taxation.[85] Once a party has been successful in

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[77] J Klaaren "Towards Affordable Legal Services: Legal Costs in South Africa and a Comparison with Other Professional Sectors" (19-10-2018) *University of Witwatersrand* <https://www.lssa.org.za/upload/files/Costs%20conference/Prof%20Jonathan%20Klaaren%20Paper%20SALRC%20v%201a.pdf > (accessed 16-02-2019).

[78] Anonymous "Understanding Legal Costs in South Africa: A Simple Guide" (2019) *DSC Attorneys* <https://www.dsclaw.co.za/articles/understanding-legal-costs-in-south-africa-a-simple-guide/> (accessed 19-12-2019). See also: S Peté, D Hulme, M du Plessis, R Palmer, O Sibanda & T Palmer *Civil Procedure: A Practical Guide* 3 ed (2016) 332-333.

[79] Anonymous "Understanding Legal Costs in South Africa: A Simple Guide" *DSC Attorneys.*

[80] GN R 858 in *GG* 43592 of 07-08-2020; GN R 107 in *GG* 43000 of 07-02-2020.

[81] Anonymous "Understanding Legal Costs in South Africa: A Simple Guide" *DSC Attorneys.*

[82] Anonymous "Understanding Legal Costs in South Africa: A Simple Guide" *DSC Attorneys.*

[83] Anonymous "Understanding Legal Costs in South Africa: A Simple Guide" *DSC Attorneys.*

[84] Anonymous "Understanding Legal Costs in South Africa: A Simple Guide" *DSC Attorneys.*

[85] *Jonker AO v Taxing Master of the High Court* 2019 JDR 1145 (FB) para 5.

a case and have been awarded legal costs, the bill of costs must be prepared (often done by an external service provider known as a cost consultant). The bill of costs is then served on the unsuccessful party, and a copy is sent to the taxing master of the particular court. The taxing master decides which costs are recoverable and payable by the losing party,[86] and signs and stamps a certificate known as an allocator, which can be used to enforce payment of legal costs.

Accordingly, legal fees consist of a complex matrix of fees combined to form one bill of costs. The problem, however, is that the monetary value of those costs can be quite burdensome.

4 4 4 The costs of legal fees charged by attorneys and advocates

When compiling a bill of costs, legal practitioners must consider the tariffs and fees as provided for in statute[87] and calculate costs based on whether the matter was heard in the High Court or Magistrate`s Court.[88] However, as mentioned above,[89] depending on the scale with which the court awards costs, attorneys and advocates may further add their own personal costs, as set up by their firm, as well as separately charge for their first consultation when obtaining a mandate from their client.

In *Camps Bay Ratepayers and Residents Association v Harrison*,[90] the Constitutional Court highlighted "how counsel's fees have burgeoned in recent years."[91] The Court held:

> "It is the concept of what it is reasonable for counsel to charge that this judgment hopes to influence. We feel obliged to express our disquiet at how counsel's fees have burgeoned in recent years. *To say that they have skyrocketed is no loose metaphor*. No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal"[92] (emphasis added).

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[86] Para 6.
[87] GN R 858 in *GG* 43592 of 07-08-2020; GN R 107 in *GG* 43000 of 07-02-2020. This may also include the fee guidelines, such as those issued by the relevant Bar Counsel of which an advocate is a member.
[88] Civil claims below R400 000 are heard in the Magistrate's Court, whereas claims exceeding R400 000 are brought in the High Court. However, the court of first instance for review applications remain the High Court, with certain designated Magistrate's Courts. See P Bracher "Claims of higher value to be heard in the magistrate's court" (25-04-2014) *Norton Rose Fulbright* <https://www.financialinstitutionslegalsnapshot.com/2014/04/claims-of-higher-value-to-be-heard-in-magistrates-courts/> (accessed 20-12-2019).
[89] See heading 4 4 3 above.
[90] 2012 11 BCLR 1143 (CC).
[91] Para 10.
[92] Para 10.

Accordingly, it is when one considers both the fees in the regulations, as well as the costs of fees charged by firms, that one realises the unaffordability thereof.[93]

For "[c]onsultation with a client and witnesses to institute or to defend an action…"[94] in the High Court, attorneys may be charge R292.50 "per *quarter* of an hour or part thereof."[95] Further, the amount of R117.50 may be charged, per page, for "drawing up, checking, typing, printing, delivery, copies…" of letters, telegrams and facsimiles.[96]

In the Magistrate's Court, fees are calculated primarily on three scales, namely: (a) Scale A (value of dispute less than or equal to R7 000); (b) Scale B (value of dispute is above R7 000, but less than or equal to R50 000); or (c) Scale C (value of dispute exceeds R50 000).[97] For defended actions, costs would be R542 (Scale A), R719.50 (Scale B) or R865.50 (Scale C), for the taking of instructions to sue, defend, institute or defend a counterclaim, or for perusing documentation.[98]

Combined with the above, should firms or attorneys add their own personal costs, then according to a 2015 report on Public Interest Legal Services in South Africa,[99] a first year junior advocate may charge "approximately R550 per hour or R5 500 per day."[100] Counsel of ten years' standing could charge between R1 500 and R2 400 per hour, or between R15 000 and R24 000 per day,[101] and senior counsel who has been awarded "silk" status could charge between R25 000 and R35 000 per day, if not more.[102]

Of course, it is true that for those members of the public who live below the poverty line, free legal services are available through either Legal Aid South Africa, the Legal Practice Counsel or through legal aid clinics and pro bono work down by those in the legal profession. However, in order to qualify for assistance by, for example, Legal Aid South Africa, one must meet the requirements of the so-called "means-test."[103] If the

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[93] Please note that the fees mentioned below are drawn from various sources. It does not represent the costs that exists across the board, and these amounts would fluctuate depending on where you are in the country, as well as the firm being used.
[94] GN R 107 in *GG* 43000 of 07-02-2020.
[95] Own emphasis added. See: GN R 107 in *GG* 43000 of 07-02-2020.
[96] GN R 107 in *GG* 43000 of 07-02-2020.
[97] GN R 858 in *GG* 43592 of 07-08-2020.
[98] GN R 858 in *GG* 43592 of 07-08-2020.
[99] Anonymous "Public Interest Legal Services in South Africa" (06-2015) *SERI* <https://www.seri-sa.org/images/Seri_Pils_report_Final.pdf> (accessed 20-12-2019).
[100] Anonymous "Public Interest Legal Services in South Africa" *SERI*.
[101] Anonymous "Public Interest Legal Services in South Africa" *SERI*.
[102] Anonymous "Public Interest Legal Services in South Africa" *SERI*.
[103] Anonymous "Legal Aid Manual" *Legal Aid SA* <https://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf> (accessed 20-12-2019).

applicant is unemployed, they do not need to complete the test, but if they are employed the test is compulsory.[104]

However, even with the options for legal aid, these forms of assistance will only help those most in need, if they can reach the offices of these institutions, and if they qualify for the assistance. A gap continues to exist for those who fail to qualify, as well for those people who might even be classified as living above the poverty line, but for whom the monetary value of legal fees, especially those fees necessary to complete a legal matter such as High Court litigation, far exceed their own or household income.

4 4 5 Final remarks

With 55.5% of the population having to make ends meet on less than R1 300 per month, it is impossible for the majority of South Africans to afford legal fees. Due to current poverty and employment levels, the fact that there are only fourteen High Court divisions, as well as the time-consuming nature of review, there remains a gap between the rich and the poor, and ensures that there cannot be access to justice for all.

There is a constant emphasis on the need to rethink the calculation of costs, and the need to accommodate more people through pro bono work. It is for precisely this reason that this thesis considers the implementation of a system of internal remedies, which can be utilised to circumvent the courts, and the complex matrix of scales and fees which can be quite burdensome, to directly approach the administration concerned itself.

4 5 The exhaustion of domestic remedies under international law

The last argument to consider in support of the implementation of a uniform system of internal remedies is the so-called exhaustion of domestic remedies under international law. Section 39 of the Constitution provides for the interpretation of the Bill of Rights, with section 39(1) providing that:

"[w]hen interpreting the Bill of Rights, a court, tribunal or forum—

[104] Anonymous "Legal Aid Manual" *Legal Aid SA*. If employed, an unmarried applicant must earn less than R7 400 per month, after tax, in order to qualify. If married, the combined income of the applicant and their spouse should not exceed R8000. Furthermore, if a house is owned, then the total value of the house and all of the applicant's belongings must not exceed R640 000. Or, if no house is owned, then the total value of all the applicant's belongings (for example, car, furniture, clothes and other personal belongings) must not exceed R128 000. Please see: <https://legal-aid.co.za/how-it-works/> (accessed 10-08-2020).

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law."

Thus, international law must be considered, when appropriate to do so under the circumstances. Accordingly, the Constitutional Court in *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* ("*Koyabe*"),[105] considered the exhaustion of domestic remedies under international law, when considering whether the mere lapsing of the time period for the exhaustion of an internal remedy (under domestic law) could be sufficient to satisfy the requirements of exhaustion under section 7(2) of PAJA.[106]

It is a recognised principle of customary international law that, should a respondent state provide domestic remedies, the applicant should first exhaust those remedies before approaching an international forum.[107] The purpose of those remedies are to provide states with the opportunity to "find their own solutions",[108] and "to make beneficial use of their access to relevant facts [and] information […]."[109]

Similarly, if and when an internal remedy exists under domestic law, the aggrieved party must first exhaust that remedy before approaching a review court.[110] If there has been non-compliance with section 7(2) of PAJA, then the court must direct the affected party to first exhaust any and all available internal remedies.[111] This allows the administration to deal with the administrative decision or action directly, allowing it to resolve the matter in accordance with its own rules and procedures.

It is nevertheless vital that one realise that the exhaustion of domestic remedies under international law, is an issue which occurs in a completely different context than that of the exhaustion of internal remedies under domestic law. Hence the

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[105] 2010 4 SA 327 (CC).
[106] Para 41.
[107] Para 41. See also *Interhandel (Switzerland v United States of America)*, Preliminary Objections, (1959) I.C.J Rep 6, where the International Court of Justice held at 27: "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law […]. Before resort may be had to an international court […] it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system".
[108] 2010 4 SA 327 (CC) para 41.
[109] Para 41.
[110] S7(2)(a) of PAJA.
[111] S7(2)(b) of PAJA.

Constitutional Court emphasising the "analogous"[112] nature of domestic remedies under international law, and merely drawing a correlation between the two rules.

Accordingly, in drawing this correlation, there remains a further important distinction between these two rules. Referencing Udombana, the Court in *Koyabe* emphasised that:

> "[a] condition for the application of the local remedies rule is that it must first be determined whether those remedies exist, which implies the *corresponding duty of the state to provide them*. . . " (emphasis added).[113]

The argument in international law, that there should be a recognisable and enforceable duty on states to provide domestic remedies, has been consistently made since the 1960's.[114] However, no similar argument has been made in relation to the exhaustion of internal remedies under PAJA at a national (domestic) level. Chapter 3 of this thesis established that there is currently no right to an internal remedy under South African administrative law, nor is there an enforceable duty against the state to demand an internal remedy.[115]

Thus, it is peculiar to note that, despite the difference in context, two diverging arguments remain. This thesis, however, draws from the arguments made by international law scholars and argues in favour of the creation of an enforceable duty against the state to provide a uniform system of internal remedies.

4 6 Reflection

The rationale behind the implementation of a uniform system of internal remedies rests primarily on four points, namely: (a) section 33(3) of the Constitution; (b) Transformative Constitutionalism; (c) South Africa's current poverty and unemployment levels; and (d) international law. Each point emphasised a different argument in favour of the creation of a duty on the state to provide members of the public with a right to an internal remedy.

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[112] 2010 4 SA 327 (CC) para 41.
[113] Para 41.
[114] AJP Tammes "The Obligation to Provide Local Remedies" in JH Kok (ed) *Volkenrechtelijke Opstellen aangeboden aan Prof Dr Gesina H. J. van der Molen* (1962) 152 152; AAC Trindade *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (1983) 57; J Udombana "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and People's Rights" (2003) Am. J. Int. *Law* 1 5-6.
[115] See heading 6 in chapter 3.

Firstly, it is required by section 33(3) of the Constitution, which recognises that review does not have to occur solely by means of the courts, and simultaneously recognises that the public administration must function as efficiently as possible. It allows one to make a direct connection with the dual nature argument of administrative law.

Secondly, the implementation of a uniform system of internal controls will support the realisation of the project of Transformative Constitutionalism, not only because it will ensure compliance with the fourth aspect of transformation,[116] but also because review, when undertaken by the administration itself, could occur considerably quicker, and at much less cost.

Thirdly, South Africa's high unemployment rate, together with marginal household income, prevents the majority of South African's from affording the high legal fees involved in settling legal matters.

Lastly, it remains peculiar that, in spite of a difference in context, international law scholars have argued, since the 1960`s, that there should be a recognisable and enforceable duty on states to provide domestic remedies, yet no similar argument has been made by scholars at a domestic level in respect of administrative law.

5 Conclusion

South Africa continues to face social, political and economic challenges well into its third decade of democracy. Accordingly, this chapter set out to illustrate why there is a need for a uniform system of internal remedies in South Africa. Its implementation will empower the public administration to deal with parties aggrieved by its decisions or actions directly, but still restrict the exercise of power in the sense that the public administration has to remain open, accessible and accountable, as it must ensure the transparency of its procedures to the broader public throughout. This allows the control and empowerment components of administrative law to function simultaneously, and links with section 33(3) of the Constitution.

However, even if a uniform system is implemented, one question remains, namely what constitutes a valid and functional internal remedy? In the following two chapters,

[116] The promotion of a culture of justification in public law interactions.

this shall be investigated in depth, in light of examples found both in local government legislation,[117] as well as elsewhere.[118]

[117] Chapter 5.
[118] Chapter 6.

Chapter 5: Determining the Basic Content of a Uniform System of Internal Remedies through the study of Local Government Legislation

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1 Introduction

Chapter 1 emphasised that this thesis is comprised of two distinct components,[1] namely: (a) the need to implement a uniform system of internal controls in South African administrative law, and (b) the content, requirements and scope of a successful internal remedy. Chapters 2,[2] 3[3] and 4[4] addressed the first component, having established that the state has not yet implemented a uniform system of internal remedies. Rather, section 7(2) of PAJA merely requires an aggrieved party to exhaust any and all available internal remedies before approaching a review court, if and when such an internal remedy exists. In the absence thereof, the aggrieved party may approach a review court directly.

Accordingly, chapter 4[5] argued that the rationale behind the implementation of a uniform system of internal remedies is two-fold: Firstly, to facilitate a greater realisation of the vision of Transformative Constitutionalism and secondly, to enable a large portion of South African society, who ordinarily do not have the financial means, to gain access to justice expediently. A uniform system of internal remedies, in which an aggrieved party can approach the public administration directly will accordingly enable marginalised sections of society to bypass the constraints associated with the court system, such as high costs and expediency in obtaining a remedy.

The second part of this thesis aims to provide the criteria for a successful and effective internal remedy, on the assumption that the argument in favour of a uniform system of internal remedies is accepted. The aim of this chapter, however, is not to provide an exact framework for an effective internal remedy, nor to provide the state with an ultimatum on what a uniform system of internal controls must include. Rather, the focus will be on three different provisions in local government legislation, one of which is an effective internal remedy, and the other two not. Utilisation of local government legislation will enable one to begin to formulate the general criteria for a uniform system of internal controls.

Thus, this chapter will first consider the minimum criteria for an effective internal remedy, as already provided by the courts, where after the focus shall shift to a study

[1] See heading 6 3 and 6 4 in chapter 1.
[2] Chapter 2 primarily discussed terminology, addressing the shift from administrative law to administrative justice.
[3] See heading 6 in chapter 3.
[4] See heading 3 in chapter 4.
[5] See heading 4 in chapter 4.

of local government legislation, specifically section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("Systems Act"), and regulations 49 and 50 of the Local Government: Municipal Finance Management Act, 2003 Municipal Supply Chain Management Regulations ("Supply Chain Management Regulations").[6]

2 The bare minimum criteria for an effective internal remedy

2 1 What qualifies as a remedy in South African law?

Michael Bishop writes that the "law without remedies is like a broken pencil. Pointless."[7] This statement implies the need for a critical understanding of what constitutes a remedy, as well as what makes it effective for a particular grievance.

Firstly, a remedy, according to the courts,[8] includes: (a) a statutory right;[9] (b) a common law right;[10] (c) an order of summary judgment;[11] (d) a right of appeal;[12] and (e) an order of the court.[13] Thus, the meaning ascribed to the word "remedy" will differ depending on the context. However, what the above-mentioned categories all have in common is that a remedy is something which is used to "cure or make better. The only precondition to the use of the word is a state of affairs which needs making better."[14]

Secondly, what makes a remedy effective? To answer this question, one must turn to the Constitutional Court judgment of *Fose v Minister of Safety and Security* ("*Fose*").[15] Ackerman J held that:

> "[i]n our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced."[16]

In light of this, Bishop opines that "effective relief" is "relief that leaves no gap between right and remedy: it makes the constitutional ideal a reality."[17] Thus, when considering

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[6] GN R 868 in *GG* 27636 of 30-05-2005.
[7] M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 06-08) 9-1.
[8] 9-4.
[9] *Fedsure Life Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA) para 2.
[10] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 1 SA 811 (SCA) 820J-821A.
[11] *First National Bank of South Africa Ltd v Myburgh* 2002 4 SA 176 (C) para 8.
[12] *S v Dzukuda*; *S v Tshilo* 2000 4 SA 1078 (CC) para 48.
[13] *Gory v Kolver NO & Others* 2007 4 SA 97 (CC) para 21.
[14] Bishop "Remedies" in *CLOSA* 9-5.
[15] 1997 3 SA 786 (CC).
[16] Para 69.
[17] Bishop "Remedies" in *CLOSA* 9-67.

the meaning of effectiveness in general, it must mean that the remedy must go hand-in-hand with the right, and be capable of vindicating any breach of said right.

However, Bishop is at pains to stress that when he uses the word remedy, he is referring to a cure "for the violation of a constitutional right."[18] This is not only crucial to understanding his study of remedies in general, but also for purposes of this thesis, specifically because this thesis focuses on the use of internal remedies, as effective mechanisms with which to cure a violation of the right to just administrative action, a *constitutional* right enshrined in section 33 of the Constitution.

Accordingly, should there be a duty on the state to provide the public with a right to internal remedies, it would fall within category (a) mentioned above, namely, members of the public having a statutory right to an effective internal remedy, if their right to just administrative action were to be violated.

2 2 The principle of *Ubi jus, ibi remedium*

In *Minister of the Interior v Harris*,[19] Centlivres CJ held:

> "There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium.*"[20]

The dictum, "where there is a right, there is a remedy",[21] was recognised in the democratic dispensation by the Constitutional Court in *August v Electoral Commission*,[22] to recognise the right of incarcerated persons to vote in democratic elections.

The dictum, *ubi jus, ibi remedium*, has achieved "near universal assent in legal systems across the world and does not seem to require much by way of normative justification."[23] Accordingly, it is widely accepted that a right must be accompanied by a remedy. One must be able to enforce a right, in order for that right to acquire meaning.[24]

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[18] 9-5.
[19] 1952 4 SA 769 (A).
[20] 780H-781A; see also Bishop "Remedies" in *CLOSA* 9-6.
[21] *Ubi jus, ibi remedium*; Bishop "Remedies" in *CLOSA* 9-6.
[22] 1999 3 SA 1 (CC) para 34.
[23] Bishop "Remedies" in *CLOSA* 9-6.
[24] Please note that the dictum is not an absolute rule. It is possible for a right to exist without a remedy. It is however generally accepted that there must be mechanism through which one can enforce your rights. See: Bishop "Remedies" in *CLOSA* 9-15 – 9-16.

Nevertheless, the discussion of this dictum should not be misconstrued to say that this thesis is arguing that there are currently no remedies in place to enforce one's right to just administrative action.[25] There are remedies, judicial review being the most prevalent one.[26] However, it is argued that, in light of prevailing socio-economic challenges,[27] there is a need for a further set of remedies, preferably in the form of a uniform system of internal controls. The implementation of such a system by the state will ensure a broader realisation of the dictum, *ubi jus, ibi remedium*, and allow a more accessible, yet still effective, method for the protection and enforcement of the right to just administrative action.

2 3 The minimum criteria for an effective internal remedy

Chapter 3[28] has already provided an in-depth discussion on the exhaustion of internal remedies under section 7(2) of PAJA, as well as the basic criteria for an effective internal remedy, noting that section 7(2) only applies to a "particular type of internal remedies."[29] However, it is worth repeating those criteria here, in order to better grasp the remainder of the discussion, both in this chapter, as well as the following chapter.

Firstly, an internal remedy is one provided for in "any other law."[30] This implies that it must be a statutory remedy.[31] According to Burns, once a statute expressly provides for an internal remedy, then no court would doubt the existence of such a remedy, and would direct the applicant to first exhaust said remedy.[32] Thus, if it is not a remedy found in statute, it cannot be an internal remedy. Parties cannot, for example, create an internal remedy by inserting a clause into a contract.

Secondly, "the remedy must be internal to the administration"[33] concerned. Accordingly, even if the remedy in question is one provided for in statute, but the particular statute and/or remedy bears no relation to the administration in question, it

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[25] S33 of the Constitution.
[26] See heading 5 3 2 in chapter 2 and heading 1 in chapter 3.
[27] See heading 4 in chapter 4.
[28] See heading 5 3 3 in chapter 3.
[29] G Quinot "Regulating administrative action" in G Quinot (ed) *Administrative justice in South Africa* (2016) 95 115.
[30] S7(2)(a) of PAJA.
[31] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115: Quinot concludes that internal remedies created under statutory regulations would also qualify.
[32] Burns & Henrico *Administrative law* 605.
[33] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.

is not an internal remedy that requires exhaustion by the applicant prior to approaching a review court.[34]

Lastly, and perhaps most importantly, the internal remedy must be "available to the complainant and be effective."[35] In *Steenkamp NO v Provincial Tender Board of the Eastern Cape*,[36] the Constitutional Court held:

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy *must* be fair to those affected by it and yet vindicate *effectively* the right violated"[37] (emphasis added).

Writing specifically in the context of internal remedies just three years later, the Court in *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* ("*Koyabe*"),[38] held that:

> "[a] remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. An internal remedy must also be readily available and it must be possible to pursue without any obstruction, whether systemic or arising from unwarranted administrative conduct."[39]

Therefore, in the context of internal remedies, a remedy would only be effective if it can provide the complainant with relief akin to the relief provided by a court.[40]

Once an internal remedy meets the above-mentioned criteria, it must be exhausted in accordance with section 7(2)(a) of PAJA. Alternatively, where the applicant has not yet done so, the court must insist on the exhaustion thereof in accordance with section 7(2)(b) of PAJA (subject to the exception in section 7(2)(c)).

In conclusion, it would appear that the most basic criteria for a uniform system of internal controls, is that the public administration should be enabled by the state to provide the public with a remedy that is (a) found in statute; (b) is internal to the particular administration; and (c) which is available, appropriate and effective for the grievance in question.

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[34] 115; *Reed v Master of the High Court of SA* 2005 2 All SA 429 (E) paras 24-25.
[35] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[36] 2007 3 SA 121 (CC).
[37] Para 29.
[38] 2010 4 SA 327 (CC).
[39] Para 44.
[40] Para 44; *Reed v Master of the High Court of SA* paras 20-25; Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.

3 The need to emphasise local government legislation

This thesis has continually emphasised the need for an accountable and open public administration, in which those whom it serves are able to hold it to account when there is a failure on the part of the administration to perform its functions correctly and efficiently.[41]

There are three spheres of government, namely: (a) national; (b) provincial; and (c) local government.[42] Together, these three spheres follow an integrated model of government, in which each sphere has distinct powers, but simultaneously also experience an overlap in certain areas.[43]

While all three spheres are critical to the effective functioning of government as a whole, this chapter seeks to emphasise specifically local government and local government legislation, as the point of departure for investigating what constitutes the criteria for an effective internal remedy. The reason for this is that local government is the sphere of government with which members of the public come into contact most frequently. This can be seen in the wording of section 152(1) of the Constitution, which holds:

> "The objects of local government are—
>
> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; and
> (e) to encourage the involvement of communities and community organisations in the matters of local government."

Thus, the arm of the public administration performing municipal functions must be able to perform its functions in a speedy, open and transparent manner.

In order to realise these objectives, legislation was promulgated, specifically the Systems Act. The preamble of the Act provides that it is promulgated:

> "[t]o provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all; […] [and] to establish a framework for support, monitoring and standard setting by other

[41] See heading 5 3 in chapter 2 & heading 2 in chapter 4.
[42] S40(1) of the Constitution: "In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated".
[43] P De Vos & W Freedman *South African Constitutional Law in Context* (2014) 221.

> spheres of government in order to progressively build local government into an efficient, frontline development agency capable of integrating the activities of all spheres of government for the overall social and economic upliftment of communities in harmony with their local natural environment; […]."

Accordingly, this Act and accompanying regulations will be discussed for the remainder of the chapter, enabling one to grasp why section 62 of the Systems Act has been uniformly accepted as an internal remedy in need of exhaustion under section 7(2) of PAJA.

However, it must be noted that emphasis has been on the creation of a uniform system of internal remedies in light of the prevailing socio-economic circumstances of the majority of South Africans. Yet, in this chapter, the focus shall be primarily on procurement cases involving large corporations which certainly possess the financial means to approach a review court. Nevertheless, these cases are used merely for illustrative purposes, to serve as the point of departure for determining the general criteria of an effective internal remedy. Chapter 6 will highlight a number of provisions that go to the heart of addressing the needs of the marginalised sections of South African society.

4 Local government legislation and regulations

4 1 Introduction

In the section that follows, section 62 of the Systems Act will be discussed in depth, in order to compare it to regulation 49 (together with regulation 50) of the Supply Chain Management Regulations. However, the reasoning and methodology behind this comparison warrants an explanation.

Udeh writes that a high number of procurement cases that come before the courts, are on municipal procurement.[44] This creates an opportunity to consider a number of judgments that have all made pronouncements on the same provisions in the Systems Act.

However, no comparison can be made between two or more legal mechanisms, without considering the effect of outside factors or variables. Thus, one way to minimize the effect that those variables might have, is to compare mechanisms which

[44] KT Udeh "Viability of bidder remedies under section 62 of the South African Municipal Systems Act" (2016) 3 *APPLJ* 72 73.

find application within the same context. By doing this, one can exclude the effects of contextual differences between different mechanisms.

Accordingly, the general application of section 62 of the Systems Act will first be considered. This will be followed by a case discussion of *Reader v Ikin* ("*Reader HC*"),[45] which impacted the applicability of section 62 in certain contexts. An in-depth discussion of section 62 in the procurement context will then follow, as well as the case law confirming it as an effective internal remedy requiring exhaustion.[46] Lastly, regulation 49 as it applies in the procurement context will be considered, allowing one to draw a clear distinction between it and section 62. This will illustrate why regulation 49 does not qualify as an internal remedy for the purposes of section 7(2) of PAJA.

4 2 The implication and effect of section 62 in the context of local government

4 2 1 The general application of section 62

Section 62(1) of the Systems Act provides an appeals procedure for any person whose rights are affected by any decision taken under a delegated power.[47] The provision holds:

> "A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

However, "[t]he provisions of section 62 do not detract from any appropriate appeal procedure provided for in any other applicable law."[48] A section 62 appeal may be lodged only against a decision taken by "persons or structures to whom powers have been delegated."[49] Yet, a decision taken under delegated authority, and which is subsequently confirmed by the municipal council, may not be appealed under section 62.

Further, it is important to note that the appeal must be lodged, in writing, with the municipal manager, within 21 days of being notified of the decision. The court in

[45] 2008 2 SA 582 (C).
[46] Please note that the case discussion is provided in chronological order.
[47] J De Visser & N Steytler "Municipal Administration" in J De Visser and N Steytler (eds) *Local Government Law of South Africa* (RS 12 2019) 8-1 8-22.
[48] 8-22.
[49] 8-22.

Amandla GCF Construction CC v Municipality Manager of Saldanha Bay Municipality,[50] confirmed that the municipal manager does not have the power to extend the 21 day period.[51]

In *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipalit*,[52] the court refused to read into section 62(1), the requirement that an award notification must be in writing.[53] Rather, "such notification may reach the affected person in any manner and from whomever, not necessarily from the decision maker."[54] Lastly, in respect of the right to reasons, the court was at pains to stress that:

> "the right to receive written reasons under section 33(2) of the Constitution is dependent upon the affected person requesting reasons within the stipulated time period from becoming aware of the action, or might reasonably have been expected to become aware. There is no requirement in either PAJA or the Constitution that the written reasons must accompany the notification of the decision, and such construction goes against the express wording of section 5 of PAJA."[55]

De Visser and Steytler argues that this produces an unsatisfactory result.[56] The timeline in PAJA extends beyond that appeal timeline, and creates an opportunity for the municipality to, through delaying the furnishing of reasons, "orchestrate the lapsing of the 21 day period."[57] They therefore submit that the 21 day period should commence on the day the aggrieved party is furnished with reasons.[58]

In spite of the above, a number of cases has sought to discuss the effectiveness of section 62 as an internal remedy, as well as going so far as to impose certain limitations on its applicability in specified circumstances. In this regard, the decision of *Reader v Ikin* ("*Reader HC*")[59] stands out, and will be discussed below.

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[50] 2018 6 SA 63 (WCC).
[51] Paras 20-45; see in this regard also: De Visser & Steytler "Municipal Administration" in *LGLSA* 8-22(1).
[52] 2014 3 All SA 560 (ECG).
[53] Para 41.
[54] Para 41.
[55] Para 41.
[56] De Visser & Steytler "Municipal Administration" in *LGLSA* 8-23.
[57] 8-23.
[58] 8-23.
[59] 2008 2 SA 582 (C).

4 2 2 Reader v Ikin

In this case, the appellants, a number of parties who lived within a community in which a building was to be erected, brought review proceedings to set aside the municipality's decision to approve the building plans of the first respondent.[60] The municipality opposed the review application on the grounds that the appellants had not exhausted the appeal under section 62 of the Systems Act.

The legal question raised on appeal, was whether or not the appellants enjoyed a right of appeal under section 62.

To answer this question, the court turned to the restriction that section 62(3)[61] imposes on section 62(1).[62] Counsel for the appellants submitted that the effect of reading the two provisions together, was that only a party whose rights are affected by the decision may lodge an appeal under section 62(1), "and that no variation or revocation of the decision in question by an appeal authority my detract from any rights that may have accrued, presumably to a third party, as a result of that decision."[63] This was confirmed by Davis J, when he held:

> "The mechanism created by ss62(1) and 62(3) of the Systems Act provides an appeal for a party aggrieved by the initial decision but does not extend to third parties who contend that their rights or legitimate expectations have been adversely affected by the decision. The latter group, however, have a right of access to a court to set aside such a decision."[64]

This decision was confirmed on appeal by the SCA, in *Municipality of the City of Cape Town v Reader* ("*Reader SCA*").[65] The SCA noted that, in addition to the findings of the court *a quo*, and contrary to the provisions of section 62, the appellants failed to allege that the approval of the building plans itself (the decision), affected their rights. Rather, they merely alleged that it was the execution thereof (construction of the building) which affected their rights.[66] This, coupled with the court's understanding of the provisions of section 62, led the SCA to confirm that section 62 is an internal remedy as contemplated in section 7(2) of PAJA. However, section 62 does not extend

[60] Para 1; Udeh (2016) *APPLJ* 79.
[61] See heading 4 4 5 for an in-depth discussion of this provision.
[62] 2008 2 SA 582 (C) para 19.
[63] Para 19.
[64] Para 32.
[65] 2009 1 SA 555 (SCA).
[66] Para 17.

to third parties who contend that their rights or legitimate expectations has been adversely affected by the decision in question.[67]

4 2 3 Effect of Reader v Ikin

The judgments in both *Reader HC* and *Reader SCA* reduced the availability of the internal appeals' mechanism under section 62. Yet, both judgments are agreeable. It may serve to limit the scope of the provision's applicability, but it does not detract from its usefulness, nor does it hold that section 62 is not an internal remedy for the purposes of section 7(2) of PAJA.

4 3 The significance of section 62 in the context of procurement

The discussion above painted a broad picture of section 62's application in general. However, in light of the versatile application of section 62 of the Systems Act, it is a mechanism often used specifically in the context of municipal procurement, serving as an internal appeals mechanism for unsuccessful bidders. The discussion that follows shall focus on section 62 in this context alone. This will be done in order to better facilitate a comparison between section 62 and regulation 49 which itself finds application specifically in the procurement context.

As with the general application above, section 62(1) provides a mechanism whereby unsuccessful bidders may "submit complaints regarding a procurement decision to the contracting authority for its reconsideration."[68]

Section 62 is quite significant because a "substantial number of procurement cases that come to the courts are on municipal procurement."[69] Accordingly, the provision creates a "well-structured internal review mechanism"[70] with the power to scrutinize any and all decisions taken by an office-bearer acting under delegated municipal authority.[71]

The advantages of section 62 are that decisions can be reached in an expedient and simple manner, which "causes less disruption to procurement",[72] and is

[67] Paras 11 & 23.
[68] Udeh (2016) *APPLJ* 72; C Vinti "Appeal against a Decision by a Political Office Bearer as Postulated by Section 62 of the Local Government: Municipal Systems Act 32 of 2000: *City of Cape Town v Reader Revisited*" (2019) 30 *Stell LR* 447 447.
[69] Udeh (2016) *APPLJ* 73; See also *CC Groenewald v M5 Developments (Pty) Ltd* 2010 ZASCA 47 para 1.
[70] Udeh (2016) *APPLJ* 73.
[71] 73.
[72] 75.

considerably cheaper than judicial review before the courts.[73] Further, in accordance with section 62(3), the appeal authority has the power to "confirm, vary or revoke the appealed decision"[74] which also allows a greater opportunity "for correction of [a] challenged decision than is generally available in judicial review."[75]

In conclusion, Udeh opines that in spite of the fact that section 62 is not the only internal review mechanism in the procurement context, "it is the only one that constitutes an effective internal remedy."[76] However, some courts have set out to limit the availability of section 62 to unsuccessful bidders, as is illustrated below.

4 4 Case law's impact on section 62's viability in the procurement context

4 4 1 Syntell (Pty) Ltd v City of Cape Town

In the matter of *Syntell (Pty) Ltd v City of Cape Town* ("*Syntell*"),[77] the court had to determine whether, on *Reader HC's* interpretation, Syntell had a right of appeal in terms of section 62 of the Systems Act.[78] Both Syntell and Actaris (the second respondent) competed for a tender invited by the City of Cape Town ("the City").[79] The City awarded the tender to Actaris on 15 January 2007,[80] but advised Actaris that the award was subject to a:

> "21 day appeal period in terms of the Municipal Systems Act and [that] no rights will accrue for 21 days from the date of this notification or until any such appeal has been finalised."[81]

Syntell was informed that their bid was unsuccessful, and appealed against the award to Actaris on 8 February 2007.[82]

Relying on the court's decision in *Reader HC*,[83] the City contended that "unsuccessful tenderers are 'third parties' *vis a vis* the successful tenderer."[84] This would mean that Syntell was a third party *vis a vis* Actaris, and thus had no right to utilise the internal appeal under section 62 of the Systems Act.

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[73] 75.
[74] 75.
[75] 75; see also the discussion on s62(3) under heading 4 4 5 below.
[76] Udeh (2016) *APPLJ* 75.
[77] 2008 ZAWCHC 120.
[78] Para 36.
[79] Para 3.
[80] Para 12.
[81] Para 13.
[82] Paras 15-16.
[83] Please note that *Syntell (Pty) Ltd v City of Cape Town* 2008 ZAWCHC 120 was decided before the SCA's decision in *Municipality of the City of Cape Town v Reader* 2009 1 SA 555 (SCA).
[84] 2008 ZAWCHC 120 para 19.

However, Syntell set out to distinguish their case from the one in *Reader HC*. Unlike in *Reader HC*, the award of the tender to Actaris was "expressly made conditional upon no appeal being lodged within the stipulated period, or any appeal being dismissed."[85] Further, the court in *Reader HC* based their judgment on the effect of section 62(3) of the Systems Act, which it understood to mean that: "once a right accrues as a result of a decision, that decision cannot be reversed on appeal if the reversal take[s] away the right initially granted."[86] However, Syntell argued that no rights had accrued to Actaris as a result of the notification in the tender award, and thus no rights existed which could be varied or revoked on appeal.

Nevertheless, the City continued to argue that rights had accrued to Actaris when the initial award was made, and Syntell had no right of appeal.[87] The court disagreed with this contention on four grounds.[88]

Firstly, no rights could have accrued to Actaris, since the award was expressly made subject to the 21-day appeals period.[89] Secondly, once Syntell brought the appeal, they had a right to see the appeal process concluded, and a decision reached in terms thereof.[90] Linked to this point is the court's view that an unsuccessful bidder's right to appeal does not, in any event, depend the notification of award referred to in section 62, but rather exists *ex lege* by virtue of section 62(1).[91] Thirdly, the facts of *Syntell* were distinguishable from those in *Reader HC*, meaning that the ratio in *Reader HC* was "not applicable to Syntell's internal appeal".[92] Lastly, there were "no accrued rights which could be affected by a variation or revocation of the tender award on appeal."[93]

The court in *Syntell* confirmed the right of unsuccessful bidders to appeal under section 62 of the Systems Act, by distinguishing itself from *Reader HC* and holding that *Reader HC's* ratio does not apply in the procurement context.

[85] Para 21.
[86] Para 32.
[87] Para 57.
[88] Para 58.
[89] Para 58.
[90] Para 59.
[91] Paras 65 & 68.
[92] Para 82.
[93] Para 83.

4 4 2 Loghdey v City of Cape Town

Before the judgment in *Loghdey v City of Cape Town* ("*Loghdey*"),[94] "unsuccessful tenderers in municipal procurement generally enjoyed a right of appeal under section 62 of the Systems Act."[95] The judgment in *Syntell* was one of the cases to confirm that right.[96] However, the court in *Loghdey* disputed such a general right in the context of the facts of the particular case, creating doubt for future cases.

The City of Cape Town ("the City") began a competitive bidding process for the "provision of a kerbside parking management service."[97] While the City awarded the contract to the successful bidder, the two unsuccessful bidders applied to court for "review and set-aside of the award."[98] Their allegations were that the City acted contrary to its own Supply Chain Management Policy ("SCMP") by not notifying all the bidders of its decision to accept the successful bid, and for not informing them of their right under section 62 of the Systems Act to appeal against the decision within 21 days "before the contract award".[99] The court, however, proceeded to ask whether unsuccessful bidders have a right to appeal in terms of section 62 "before"[100] the award. The court answered in the negative.

The court's findings were based on three grounds, namely (a) that the tender documents themselves are not binding, with *Loghdey* being distinguishable from *Syntell* on this basis; (b) that the right to appeal is only for the person who has asked or applied for the decision; and (c) that the SCA's judgment in *Reader SCA* had the effect of overruling earlier High Court precedents.[101]

However, Udeh argues that the court's decision in *Loghdey* was "erroneous, considering judicial precedent at the time",[102] and I support this view.

With regards to (a), the court held that the tender documents themselves do not afford bidders a right of appeal under the Systems Act.[103] In this regard, two issues need to be addressed. Firstly, the court held that the City's SCMP clauses as well as conditions of tender "were merely an attempt by the City to record its understanding

[94] 2010 ZAWCHC 25.
[95] Udeh (2016) *APPLJ* 76.
[96] 76.
[97] 77.
[98] 77.
[99] 77.
[100] 77.
[101] 77-80.
[102] 76.
[103] 2010 ZAWCHC 25 para 25.

of the effect of section 62."[104] Accordingly, unless the award notification contains a similar reference to those provisions, those clauses and conditions are, on their own, not binding.[105] Yet, this interpretation is inconsistent with the decision of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency NO* ("*Allpay Consolidated*"),[106] where the Court held that:

> "The Circular and the Request for Proposals, read together with the constitutional and legislative procurement provisions, thus constituted the legally binding and enforceable framework within which tenders had to be submitted, evaluated and awarded."[107]

This implies that all tender documentation, together with the tender or tenders received in response thereto, forms "the basis for the formal contract to be concluded; and their requirements are not merely internal prescripts that contracting authorities may disregard at whim."[108] Accordingly, the decision in *Allpay Consolidated* trumps the decision in *Loghdey*,[109] showing that *Loghdey* is incorrect.

Secondly, the court in *Loghdey* held that there was a clear distinction between its facts and those of *Syntell*, where the award notification was expressly made subject to section 62.[110] However, I doubt whether a distinction can be drawn between the two cases on that basis alone. Both *Syntell* and *Loghdey* were High Court decisions considering the broader issue of whether section 62 of the Systems Act finds application in procurement matters.[111] They therefore concern the same issue. Further, as confirmed by *Allpay Consolidated*, both the tender documents and applicable policies are binding,[112] and the court in *Syntell* specifically stated that an unsuccessful bidder's right to lodge an appeal under section 62 is not derived from a "notification of award",[113] but rather "already existed (*ex lege*) by virtue of section 62(1)."[114] This would mean that separate notice of section 62 in the notification award is unnecessary.

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[104] Udeh (2016) *APPLJ* 78, 2010 ZAWCHC 25 para 28.
[105] Udeh (2016) *APPLJ* 78; 2010 ZAWCHC 25 para 28-31.
[106] 2014 1 SA 604 (CC).
[107] Para 38, together with footnote 42 of the judgment.
[108] Udeh (2016) *APPLJ* 78.
[109] 78.
[110] 77.
[111] 78.
[112] 78.
[113] 78-79.
[114] 2008 ZAWCHC 120 paras 65 & 68.

With regards to (b), the second ground for the court's finding in *Loghdey*, the court held that the right to appeal is only for the person who has asked or applied for the decision. It was the view of the court that the facts in *Loghdey*, were on par with those in *Reader HC*, and thus strictly applied the *Reader HC* rule, as confirmed in *Reader SCA*.[115] Yet, the facts and circumstances were quite distinguishable.

The court in *Reader SCA* had to determine whether third parties who objected to an applicant's building plans, were entitled to an appeal under section 62, and the court answered in the negative.[116] Yet in *Loghdey*, the unsuccessful bidder was a party to the procurement process.[117] This would mean that the unsuccessful bidder falls within the category of objectors that would have access to section 62 under the rule in *Reader SCA*, since the unsuccessful bidder also applied for the decision. Meaning, through submitting a bid, the unsuccessful bidder applied for the contract to be awarded to it. The unsuccessful bidder is therefore quintessentially a party whose application (in this case its bid) is turned down or rejected, which is under *Reader SCA*, exactly the type of party that can rely on a section 62 appeal.

Lastly, in terms of (c), the third ground for the courts' finding in *Loghdey*, it appears that the court assumed that *Reader SCA* overruled earlier High Court judgments which confirmed the right of unsuccessful bidders to appeal under section 62.[118] Again, this is incorrect. As seen above, both *Reader* judgments dealt specifically with third parties objecting to the approval of a building permit, not unsuccessful bidders disputing the outcome of a procurement process. This implies that earlier High Court judgments, which confirmed that unsuccessful bidders may appeal under section 62, continue to apply.[119]

Nonetheless, and despite the arguments made here, it was believed that the decision in *Loghdey* severely restricted the right of unsuccessful bidders to lodge an appeal under section 62 of the Systems Act.[120]

[115] Udeh (2016) *APPLJ* 79.
[116] 80.
[117] 80.
[118] 80.
[119] 80.
[120] 81.

4 4 3 CC Groenewald v M5 Developments (Pty) Ltd

Two months after the decision in *Loghdey*, the SCA rendered judgment in the case of *CC Groenewald v M5 Developments (Pty) Ltd* ("*Groenewald*"),[121] which in effect overturned the decision in *Loghdey*.[122]

In this matter the municipality of Cape Town had invited tenders for the provision of low-cost housing. M5 Developments originally received the tender, with the unsuccessful bidders being informed in writing of both the outcome, and their right to appeal the award within 21 days under section 62.[123] While two unsuccessful bidders, Blue Whale and ASLA, both filed notices to appeal under section 62, only Blue Whale did so within the prescribed 21-day period.[124] Nevertheless, the municipal manager (Groenewald), acting as the appeal authority under section 62, reversed the original decision and awarded the tender to ASLA.[125] This led to M5 Developments instituting review proceedings in the High Court, which overturned the decision of Groenewald. Groenewald, the municipality and ASLA all appealed to the SCA.[126]

In both the court *a quo*, and in its heads of argument on appeal, M5 Developments relied on the judgment in *Reader SCA*, and contended that:

> "as an unsuccessful tenderer, [ASLA] did not have clearly defined rights adversely affected by the decision of the tender adjudication committee."[127]

Accordingly, M5 Developments argued that ASLA and Blue Whale did not have a right to appeal under section 62.[128] However, counsel for M5 Developments conceded in argument on appeal that both ASLA and Blue Whale enjoyed a right to appeal under section 62.[129]

The SCA believed that this concession was "correctly made",[130] stating that its interpretation of the majority judgment in *Reader SCA* was that:

> "s 62 gives no general right to appeal to those who object to a municipal planning permission or decision and that a neighbour, who was not a party to the application for the

[121] 2010 ZASCA 47.
[122] Udeh (2016) *APPLJ* 81.
[123] 2010 ZASCA 47 paras 5 & 10.
[124] Para 11.
[125] Para 2.
[126] Para 2.
[127] Para 20.
[128] Para 20.
[129] Para 20.
[130] Para 21.

approval of the building plans, did not have a right directly affected by a decision on the application and thus had no right to appeal under s 62."[131]

The SCA highlighted that the majority in *Reader SCA* specifically did not address the question of whether "an unsuccessful tenderer would have a right to appeal against the acceptance of the tender of another".[132] Therefore, the SCA held in the present matter that the two unsuccessful bidders, together with M5 Developments, were all parties to the tender proceedings, and that they were entitled to an appeal under section 62 of the Systems Act.[133]

Accordingly, the SCA succeeded in distinguishing the facts before it from those in *Reader SCA*, and finding that unsuccessful bidders do enjoy a general right of appeal under section 62.[134]

The SCA also made to two further important findings. Firstly, an appeal authority may only reconsider the bids of the parties who submitted an appeal, as opposed to reconsidering all the tenders submitted.[135] Secondly, the appeal authority may not award the tender to a party who did not lodge an appeal against the original award.[136]

The SCA ultimately dismissed the appeal.

4 4 4 The confirmation of the Groenewald decision

Some have argued that the facts in *Groenewald* are distinguishable from those in *Loghdey*, which would imply that the findings in *Loghdey* would continue to apply.[137] This argument is based on the fact that in *Groenewald*, the notification of award specifically highlighted the right of unsuccessful bidders to appeal within 21 days under section 62, whereas the notification of award in *Loghdey* did not contain a similar condition.[138] Nonetheless, Udeh raises a number of points which may be used to counter this argument, to ensure that *Groenewald* continues to be seen as confirmation of the viability of section 62 of the Systems Act as an internal remedy in procurement cases.

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[131] Paras 19 & 21.
[132] Para 19.
[133] Para 21.
[134] Udeh (2016) *APPLJ* 82.
[135] 2010 ZASCA 47 paras 22-23.
[136] Para 25.
[137] Udeh (2016) *APPLJ* 83.
[138] 83.

Firstly, the SCA in *Groenewald* regarded the right to appeal under section 62 to accrue to unsuccessful bidders *ex lege*, and not by means of contract.[139] This means that the right of appeal does not accrue only when there is a reference to section 62 in the notification award. Secondly, in *Loghdey*, reference was made to a 21 day appeal period, as well as section 62, in both the municipality's SCMP and conditions of tender.[140] As was confirmed in *Allpay Consolidated*, the SCMP and conditions of tender are "deemed incorporated into the award notification and binding on all the parties".[141] Thus, whether there is such a condition in the notification of award should not have an impact on the availability of section 62 as an internal remedy. Lastly, in *Groenewald*, the SCA specifically held that the *ratio* of *Reader SCA* did not apply to unsuccessful bidders.[142] This would imply that the court's findings in *Loghdey* was overruled by the SCA's judgment in *Groenewald*, because *Loghdey* was squarely based on the ratio in *Reader SCA*.

In my opinion, Udeh succeeds in distinguishing *Loghdey* (restricting the right of unsuccessful bidders to lodge an appeal under section 62) from those cases such as *Groenewald*, which has confirmed the right of unsuccessful bidders to appeal under section 62. An unsuccessful bidder has an *ex lege* right to appeal and that right does not depend on whether reference was made to such a right in the award notification of the tender concerned.[143] To require a notification of award to reference section 62 directly, would be to misunderstand the wording and effect of section 62, as well as to disregard the Constitutional Court's finding in *Allpay Consolidated*.

Accordingly, the SCA's ruling in *Groenewald* overturned *Loghdey*, and restored the right to an appeal of unsuccessful bidders under section 62. Groenewald was subsequently applied in *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality*[144] and in *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* ("*DDP Valuers*").[145]

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[139] Udeh (2016) *APPLJ* 83; See also *Syntell (Pty) Ltd v City of Cape Town* 2008 ZAWCHC 120 paras 65 & 68.
[140] Udeh (2016) *APPLJ* 83; 2010 ZAWCHC 25 para 16.
[141] Udeh (2016) *APPLJ* 83; 2014 1 SA 604 (CC) para 38 read with footnote 42 of the judgment.
[142] See heading 4 4 3 above.
[143] Udeh (2016) *APPLJ* 84.
[144] 2014 3 All SA 560 (ECG).
[145] 2015 ZASCA 146.

4 4 5 The effect of 62(3) of the Systems Act

While section 62(1) is now generally accepted as an internal remedy to be exhausted by unsuccessful bidders, section 62(3) of the Systems Act serves as a stumbling block for the full and effective realisation of the remedy.

Section 62(3) holds:

> "The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision."

While the subsection indicates the wide variety of remedies that may be exercised by an appeal authority, the interpretation of the provision by courts seems to be in need of reconsideration.[146]

Currently, courts are interpreting section 62(3) to mean that a:

> "section 62 appeal cannot succeed if it will result in a revocation or variation of a right that has accrued from the decision in issue. This effectively exempts unconditional award or concluded contracts from the appeal."[147]

The majority judgment of the SCA in *Reader SCA* viewed section 62(3) as effectively protecting the decision of the political office bearer.[148]

However, Vinti rightly opines that this is an incorrect interpretation, and that the preferable interpretation of section 62(3) can be found in the minority judgment of Jafta JA.[149] According to Jafta JA, section 62(3):

> "does not protect the decision, which constitutes the subject matter of the appeal itself, from being varied or revoked. Section 62(3) protects the rights, which have accrued as a consequence of such a decision."[150]

Accordingly, if the appeal authority does decide to vary or revoke the impugned decision, subsection (3) will be triggered and the variation or revocation should not affect rights which have accrued as a result of the impugned decision.[151] Thus, section 62(3) should be interpreted to protect the rights of an applicant who has acquired rights

[146] Udeh (2016) *APPLJ* 85-86; Vinti (2019) *Stell LR* 461-462.
[147] Udeh (2016) *APPLJ* 85; Vinti (2019) *Stell LR* 461. Both authors refer specifically to *Municipality of the City of Cape Town v Reader* 2009 1 SA 555 (SCA).
[148] Vinti (2019) *Stell LR* 462.
[149] 461.
[150] 461; 2009 1 SA 555 (SCA) para 25.
[151] Vinti (2019) *Stell LR* 461.

"in the matter on the strength of the decision of the relevant authority."[152] Such an interpretation would bring the provision in line with the principle of legal certainty.[153]

In light of the above, both Udeh and Vinti argue that section 62(3) should be amended to enable the full and effective functioning of the provision as a whole.[154]

Nevertheless, interpretative problems with section 62(3) should not detract from the general functionality of section 62(1) which continues to serve as an internal remedy for unsuccessful bidders. Both *Reader HC* and *Reader SCA*[155] dealt with a very particular set of facts, and the judgments must be viewed in that light. Further, every court from *Syntell*[156] to *Groenewald*[157] managed to distinguish their facts from *Reader (HC and SCA)*, as well as confirm section 62 as an effective internal remedy, in spite of section 62(3).

I therefore continue to view section 62 as an example of an effective internal remedy.

4 4 6 Comparing section 62 to regulation 49

The discussion above has illustrated that section 62 of the Systems Act is generally accepted to provide unsuccessful bidders with a right of appeal and an effective internal remedy.

The primary focus of section 62, in the procurement context, is to provide an appeal to unsuccessful bidders who wish to appeal against a tender awarded under a delegated authority.[158] Section 62 is not be utilised by third parties who were not party to the tender process, and who cannot prove that their rights were directly affected by the decision of the bid adjudication committee. However, third parties may approach a review court directly. Lastly, an unsuccessful bidder's right to appeal does not depend on the inclusion of a specific condition referencing section 62 in the award notification, it is an *ex lege* entitlement.

While this would enable one to have a firm grasp of the applicability in the procurement context of section 62 of the Systems Act, it has not yet been compared

[152] 461.
[153] 461.
[154] Udeh (2016) *APPLJ* 86-87; Vinti (2019) *Stell LR* 462.
[155] High Court and Supreme Court of Appeal.
[156] 2008 ZAWCHC 120 paras 82-83.
[157] 2010 ZASCA 47 paras 21, 23-24, 27.
[158] G Quinot "Enforcement of procurement law from a South African perspective" (2011) *P.P.L.R* 193 197.

to regulations 49 and 50 of the Supply Chain Management Regulations, nor has the reason for why regulation 49 is not deemed to be an effective internal remedy been discussed.

Regulation 49 provides that:

> "The supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action."[159]

Regulation 49 then functions jointly with regulation 50, which sets out the procedure for the resolution of disputes, objections, complaints and queries as envisioned in regulation 49.

It would appear that regulation 49 "does not necessarily oblige a local authority to provide for an internal appeal in its procurement policy."[160] Yet, it is less constricting than section 62, as it allows a larger group of people to lodge complaints, and those complaints can also be lodged against a wider range of procurement decisions.[161] Conversely, section 62 is only available to a person "'whose rights are affected' by the procurement decision taken in terms of a delegated power'".[162] Regulation 49 is available to "all 'persons aggrieved' by any decision or action taken 'in the implementation of [the authority's] supply chain management system'".[163]

Regulation 49 (in conjunction with regulation 50) and section 62 are therefore distinct and separate remedies that appear to cater to different groups.[164]

Nonetheless, regulation 49 is not recognised as an effective internal remedy in need of exhaustion for the purposes of section 7(2) of PAJA. Regulation 49 allows a municipality or municipal entity to formulate its own policy, but with the requirement that it provides for a process as set out in regulations 49 and 50. However, it is a well-established principle that the policy of a particular authority "cannot override the legislative provision contained in [section] 62 of the Systems Act".[165] This implies that any remedy in an authority's policy that falls short of an internal appeal would be

[159] GN R 868 in *GG* 27636 of 30-05-2005.
[160] Quinot (2011) *P.P.L.R* 196; see also Udeh (2016) *APPLJ* 76.
[161] Quinot (2011) *P.P.L.R* 196.
[162] 196.
[163] 196.
[164] 196.
[165] 196.

"subsumed by the wider [section] 62 appeal mechanism."[166] Accordingly, section 62 would appear to "obviate the usefulness of regulation 49",[167] seeing that both relate to municipal internal remedies and the Systems Act, as statute, enjoys precedence over regulations.[168] Lastly, in *DDP Valuers*, the SCA confirmed that regulations 49 and 50 fall short of what is seen as an internal remedy for the purposes of section 7(2) of PAJA.[169]

Section 62 therefore remains the primary mechanism through which unsuccessful bidders will challenge the award of tenders.

4 4 7 Insight gained from case law

Both section 62 and regulation 49 have now been discussed. The purpose for the comparison between these mechanisms, in the procurement context, is to provide a legal framework within a single context of administrative decision-making, of internal mechanisms that do and do not qualify as internal remedies. This provides one with a useful set of remedies, applicable to the same decisions. These remedies can then be analysed to determine what the basic characteristics of an effective internal remedy are by looking at what makes one of these mechanisms an effective internal remedy and what makes the other not an effective internal remedy. Their comparison reveals the presence in the one instance and the absence in the other instance of those aspects of the mechanism that would qualify it as an effective internal remedy.

In the next component of this chapter, section 62 and regulation 49 will be weighed against a set of criteria, already deemed to be applicable to effective internal remedies.

4 5 Basic characteristics of an effective internal remedy

As was confirmed above,[170] the most basic characteristics of an internal remedy, is that: (a) it must be found in statute; (b) should be internal to the particular administration concerned; and (c) should be available, appropriate and effective for the grievance in question.

If section 62 is weighed against these criteria, it would appear that section 62 embodies all three. Firstly, section 62 is found in statute, namely: the Systems Act. Secondly, the remedy is internal to local government, more specifically the

[166] 196; see also Udeh (2016) *APPLJ* 76.
[167] Udeh (2016) *APPLJ* 76.
[168] 76.
[169] 2015 ZASCA 146 paras 16-20.
[170] See heading 2 3 above.

procurement component of municipal structures. Lastly, section 62 is deemed an available, appropriate and effective remedy for unsuccessful bidders to rely on, when challenging the outcome of tender procedures.[171]

Conversely, while regulations 49 and 50 appear to meet criteria one and two,[172] it falls short of the third criteria.[173] Regulation 49 may allow a municipality or municipal entity to formulate its own policy, but that policy may not override the legislative provisions contained section 62. Section 62 seems to override regulation 49. Thus, regulation 49 is not an effective internal remedy in need of exhaustion under section 7(2) of PAJA.

Nevertheless, it is important to consider whether these three criteria are the only characteristics of a successful and effective internal remedy. Surely, internal remedies must be capable of achieving more?

Thus, a fourth criteria is expediency. This means that an effective internal remedy is one which allows decisions to be reached in a quick and forthright manner, allowing speedy resolution of disputes.[174] Unlike judicial review which could take anywhere between nine months and two years to complete (if there is no disruption and all steps are followed without delay, which is seldom the case),[175] an internal remedy must empower its utiliser to gain access to the public administration, and be provided with a decision within a reasonable amount of time. While there will be a variance in the different time-periods to be followed, it generally amounts to a relatively short period of time within which the aggrieved party and the administrator concerned, must act.

Further, an internal remedy must as far as possible be able to bring finality to a dispute, instead of allowing room for doubt.[176] This is in line with the *functus officio* doctrine, or so-called principle of finality.[177] Accordingly, those with decision-making powers must be able to exercise their powers without fear, favour or prejudice. Once

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[171] This is so despite the current interpretative problems surrounding s62(3). See heading 4 4 5 above.
[172] It is found in statute, and is internal to the municipal procurement structures.
[173] 2015 ZASCA 146 paras 16-20.
[174] See heading 4 4 1 in chapter 4; *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* 2010 4 SA 327 (CC) para 44: "[…].An internal remedy must also be readily available and it must be possible to pursue without any obstruction, whether systemic or arising from unwarranted administrative conduct."; See also: Udeh (2016) *APPLJ* 75, where he specifically focusses on s62.
[175] See heading 4 4 1 in chapter 4.
[176] See heading 5 3 5 in chapter 3.
[177] See in this regard, DM Pretorius "The origins of the functus officio doctrine, with specific reference to its application in administrative law" (2005) 122 *SALJ* 832 832: "a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers *only once* in relation to the same matter" (emphasis added).

the internal remedy has been invoked by an aggrieved party, the decision reached under the utilisation of said remedy must be both acceptable and final.

However, finality here should not be understood to mean that once a decision has been reached by the administrator, it cannot be challenged through lodging a review application in the courts. This is not what I mean by an "acceptable and final decision". Due to the wording of both PAJA and section 33 of the Constitution, judicial review will always be a formal possibility, and in this sense, internal remedies will never be able to bring finality to an administrative matter.

Therefore, this criteria means that the content of the administrative decision should be clear, understandable and acceptable to both parties at the conclusion of the internal remedy. That is, even if the aggrieved party loses on the internal remedy, they should nevertheless be satisfied that the decision was reached in a fair and just manner, implying that the decision in question is indeed the appropriate one and that there is no need to lodge a further challenge by way of review.

Accordingly, if administrators are properly trained, and if there is a sufficient regulatory framework in terms of which they are empowered to act, internal remedies present a greater opportunity to provide an aggrieved party with a substantive solution for their administrative query, than judicial review, and accordingly bring substantive finality to the dispute. Internal remedies provide a mechanism with which the time-consuming and expensive nature of administrative dispute-resolution through judicial review can be addressed.

In conclusion, these criteria serve as the general criteria for what one would want internal remedies to achieve. It is the point of departure for those serving in the executive to formulate the principles necessary to establish and implement a uniform system of internal controls (and remedies).

4 6 Final remarks on section 62

The aim of this section was to provide an in depth and calculated discussion on section 62 of the Systems Act, in order to compare it to regulations 49 and 50 of the Supply Chain Management Regulations. As stated above,[178] focus was placed specifically on local government legislation, due to it being the part of the public administration that members of the public come into contact with most often, for

[178] See heading 3 above.

methodological reasons, as well as due to the high prevalence of review cases (concerning municipal procurement) before the courts.[179]

The significance of section 62 as an internal remedy was highlighted, and the discussion of case law illustrated that despite debate amongst the courts, the SCA has clearly confirmed section 62 to be an effective internal remedy in need of exhaustion under section 7(2) of PAJA. While the provision may be relied on by unsuccessful bidders challenging a procurement decision taken under delegated powers, it may not be relied on by third parties who were not a part of the tender process. Rather, such third parties must approach a review court directly, should they wish to challenge the outcome of the particular tender process.

Further, the comparison between section 62 and regulation 49 also revealed that a mechanism need not be comprehensive in the sense that it must be available, across the board, to everyone. It is acceptable for a remedy to be limited to a specific set of aggrieved parties.[180] This will better enable the administration to deal with administrative matters, instead of being inundated by complaints for which it lacks the capacity to resolve.

In short, the discussion showed that effective internal remedies are (a) found in law; (b) internal to the administration concerned; (c) available, appropriate and effective; (d) capable of allowing for speedy resolution of disputes; and (e) capable of producing a final and binding decision.

While section 62 meets the above-mentioned criteria, regulations 49 and 50 are deemed to fall short of these five general criteria, and illustrates that, unless remedies are clearly formulated, they will not qualify for exhaustion under section 7(2) of PAJA.

5 Conclusion

Chapters 3 and 4 addressed the first component of this thesis, namely: that the state has not yet implemented a uniform system of internal remedies. Rather, section 7(2) of PAJA requires one to exhaust an internal remedy if and when it exists. Chapter 4 then specifically addressed the rationale behind the need to implement a uniform system of internal controls.

[179] 2010 ZASCA 47 para 1.
[180] This point will specifically be elaborated on in chapter 6, in relation to section 8 of the Immigration Act 13 of 2002, and section 40 of the South African Schools Act 84 of 1996.

Accepting the argument made in chapter 4, the aim of this chapter was to highlight the general criteria for a successful and effective internal remedy. Its aim was not to provide an exact framework for an effective internal remedy, nor to provide the state with an ultimatum on what a uniform system of internal controls must include.

The discussion of section 62 and regulations 49 and 50 highlighted the general characteristics of an effective internal remedy, yet, section 62 is not the only effective internal remedy that exists. There are other examples appearing in the South African statute book. Therefore, the following chapter of this thesis will aim to highlight a number of these examples, allowing one to formulate a more coherent set of principles that a uniform system of internal remedies should comply with, which may cater for the needs of marginalised groups and advance the project of Transformative Constitutionalism.

Chapter 6: A Comprehensive Study of the Content and Scope of a Uniform System of Internal Remedies

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1 Introduction

The preceding chapter reiterated: (a) the need to implement a uniform system of internal controls in South African administrative law, and (b) the content, requirements and scope of a successful internal remedy. While the first component (a) was addressed in chapters 2, 3 and 4, the principle purpose of chapter 5 was to initialise a discussion of the second component (b), and in so doing, provide the general criteria for an effective internal remedy that requires exhaustion in terms of section 7(2) of PAJA.

While chapter 5 provided the general criteria for an effective internal remedy, this chapter seeks to shift the focus specifically to the South African context, and the implication of the ideal of administrative justice as envisioned by the Constitution. Without considering the impact of poverty, income inequality, and a general lack of access to justice for those within the marginalised sections of society, there can be no concrete and effective determination of the criteria for a uniform system of internal controls.

Accordingly, this chapter will first highlight the importance of the need for an accountable public administration, which is committed to realising the vision of Transformative Constitutionalism. Secondly, the general criteria for an effective internal remedy, as discussed in chapter 5, will be highlighted. Thirdly, a number of statutory provisions, already recognised as effective internal remedies, will be discussed. These remedies aim to assist marginalised members of the public who do not ordinarily have the financial means, to gain access to justice expediently. These provisions, as interpreted by both the courts and academia, will be used to formulate a further set of criteria for a uniform system of internal controls.

2 Accountability and Transformative Constitutionalism

This thesis has emphasised continuously the need for an efficient and accountable public administration,[1] as enshrined in section 195 of the Constitution.[2] Chapter 4 argued that one of the ways to ensure that the public administration both foster, and maintain, a culture of accountability, is through the realisation of the project of

[1] See heading 5 3 in chapter 2 and heading 2 in chapter 4.
[2] S195(1)(f) of the Constitution: “Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: Public administration must be accountable”.

Transformative Constitutionalism.[3] My interpretation of Transformative Constitutionalism in the context of administrative justice, is that it implies a need for the public administration to create a "culture of justification"[4] in order to realise the vision of an accountable public administration. However, a culture of justification does imply a very particular task for the public administration itself. As I argued in chapter 4,[5] it is not just for members of the public to expect that the public administration should justify why it made a specific decision, or took a certain action. Rather, the public administration itself should realise that it should foster and enforce this culture of justification. It must come from within. That is the only way an inherent culture of justification will exist, in which the administration knows beforehand that it will have to justify its decision or action, and the public simultaneously knows that its request for justification will be met.

Chapter 4 further maintained that the mechanisms through which the above can be achieved, is access to the right to reasons (under section 5 of the PAJA) and a uniform system of internal controls.[6] Once a member of the public initialise the procedure of a particular internal remedy, the administration concerned must provide reasons for its decision to either vary, confirm or overturn the decision under review.

Accordingly, chapter 6 builds on both this argument, as well as the general criteria for a uniform system of internal controls provided in chapter 5, and will endeavour to indicate that one of the most important rationales behind a uniform system of internal remedies, is to ensure a more open and accessible public administration, which is efficient and accountable, and which can enable marginalised sections of society to gain access to justice, without having to approach a review court.

3 Previously confirmed characteristics of an Effective Internal Remedy

Chapter 5 determined that an internal remedy that requires exhaustion under section 7(2)(a) of PAJA, is one which is: (a) found in law; (b) internal to the administration concerned; and (c) available, appropriate and effective.[7] It further established that an internal remedy must also be (d) capable of allowing a speedy resolution of disputes; and (e) capable of producing a final and binding decision.[8]

[3] See heading 4 3 in chapter 4.
[4] See heading 4 3 in chapter 4.
[5] See heading 4 3 in chapter 4.
[6] See heading 4 3 in chapter 4.
[7] See heading 2 3 in chapter 5.
[8] See heading 4 5 in chapter 5.

However, will the above-mentioned criteria be able to effectively assist the marginalised sections of society to gain access to the justice system? Is there not a possibility that internal remedies are subject to more principles? There is no way to answer this question without having further recourse to case law and academic literature.

Thus, it is important to determine whether a further number of criteria exist which should inform the decision-making of the state, when formulating the principles and procedures of a uniform system of internal controls that is fit-for-purpose in the South African context. This will be done by examining both statute and case law.

4 A focus on the poor and marginalised

In chapter 5 the focus fell primarily on section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("Systems Act"). This meant that a number of cases were discussed involving large corporations which possessed the financial means to approach a review court, if they were an unsuccessful bidder in a procurement matter.[9]

However, it is a sad reality that the same cannot be said about a large portion of South African society, who continue to live in poverty. South Africa's unemployment figure reached record highs of 29.1% in 2019, and 30.1% in the first quarter of 2020.[10] Roughly 55.5% of the population were living below the upper-bound poverty line,[11] which means that the majority of South Africans lack the financial means to access justice through the court system. Nevertheless, even if a marginalised person could gain access to the courts, it is a fact that judicial review continues to be a task mainly performed by the High Court, and can take anywhere between nine months to two years to complete, if all procedures are followed correctly.[12] It is an extremely timeous process, causing the wheels of justice to turn extremely slowly.[13]

Accordingly, with such prevailing circumstances, the implementation of a uniform system of internal controls could present marginalised people with the means to gain access to justice both speedily and affordably. While a uniform system of internal controls would surely need to accommodate both the financially strong and weak, it is

[9] See heading 3 in chapter 5.
[10] Anonymous "Quarterly Labour Force Survey" (23-06-2020) *StatsSA* <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2020.pdf> (accessed 03-07-2020).
[11] See heading 4 4 2 in chapter 4.
[12] See heading 4 4 1 in chapter 4.
[13] The recent extension of PAJA jurisdiction to lower courts is unlikely to change this situation much given the extensive possibility of appeals against lower court judgments to the High Court. See heading 1 3 1 in chapter 1 & heading 4 4 1 in chapter 4.

primarily the poor and marginalised who will be best served through the implementation thereof.

However, the realisation of such a system poses unique challenges, and the criteria used to implement this system must be well-formulated. Therefore, in order to further investigate and formulate these criteria, focus will be placed on a number of internal remedies, already implemented and utilised, in the immigration, social assistance and school fee context. These provisions, together with a discussion of case law, follow below.

5 Section 8 of the Immigration Act 13 of 2002

5 1 General

The first provision to consider is section 8 of the Immigration Act 13 of 2002 ("Immigration Act"), a highly detailed provision which provides two separate channels of internal review. It provides a step-by-step approach according to which immigration officials must process both those seeking to enter the Republic, and those wishing to leave it. Similar to the provisions compared in chapter 5,[14] section 8 allows one to compare two internal mechanisms for review, but which finds application in the same context.

The provision is cited in full and provides:[15]

"(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that *he or she may in writing request the Minister to review* that decision and-

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision-

(a) in a case contemplated in subsection (1)(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

[14] S62 and reg 49.

[15] Please note that the provision is quoted in full, here and in the following sections, to illustrate that internal remedies should provide a clear and logical step-by-step procedure. This is emphasised and explained throughout the chapter.

(b) in a case contemplated in subsection (1)(b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.

(3) Any *decision* in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be *communicated* to that person in the prescribed manner and *shall be accompanied by the reasons* for that decision.

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), *make an application in the prescribed manner to the Director-General for the review or appeal* of that decision.

(5) The *Director-General* shall consider the application contemplated in subsection (4), whereafter he or she shall either *confirm, reverse or modify that decision*.

(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, *make an application in the prescribed manner to the Minister for the review or appeal of that decision*.

(7) The *Minister* shall consider the application contemplated in subsection (6), whereafter he or she shall either *confirm, reverse or modify that decision*" (emphasis added).

Section 8 was recognised as an effective internal remedy in need of exhaustion by the Constitutional Court in *Koyabe v Minister for Home Affairs (Lawyers for HR as Amicus Curiae)* ("*Koyabe*").[16]

5 2 Koyabe v Minister for Home Affairs

5 2 1 Facts

The factual matrix of *Koyabe* was highly contested by the parties,[17] but is primarily centred around Mr Koyabe, the first applicant, and his second wife, Mrs Koyabe, who are both Kenyan nationals. While Mr Koyabe had first gained entry to the Republic in 1994 under a work permit, he subsequently divorced his first wife, a South African national, and applied for a number of different permits over the years.[18] However, in 2007, both applicants received a letter stating that they had previously obtained South African identity documents through fraudulent means and no longer qualified for permanent residence after the period, 1 July 2005.[19] They were classified as prohibited

[16] 2010 4 SA 327 (CC).
[17] Para 5.
[18] Paras 5-11.
[19] Para 12.

persons who no longer qualified for visas and were to be deported.[20] Nevertheless, they were informed of their right under section 8 of the Immigration Act to request the Minister to review the decision.[21] However, the applicants first submitted a letter to the Minister requesting the reasons for the departments' decision to withdraw or terminate their residency permits.[22] An immigration official informed them that the reasons were adequately detailed in the original letter, and that the applicants had three days to submit their application for review to the Minister.[23] The applicants decided to approach the High Court for review of the departments' decision instead.

In the High Court, it was found that the applicants had failed to exhaust section 8 of the Immigration Act, an internal remedy, as required under section 7(2)(a) of PAJA, and that the Court was obliged to deny their application under section 7(2)(b) of PAJA until they had done so. The applicants were further denied leave to appeal in both the High Court and Supreme Court of Appeal (SCA) and subsequently approached the Constitutional Court.[24]

5 2 2 Section 8 as an effective internal remedy

The Constitutional Court recognised that it was in the interests of justice for it to grant leave to appeal, in order for it to give clarity on the relationship between section 8 of the Immigration Act and section 7(2) of PAJA.[25]

First, the Court provided a detailed discussion on the duty to exhaust internal remedies under PAJA.[26] The Court recognised the importance of allowing the public administration to deal with administrative matters internally, especially since those decisions may involve specialist knowledge which the courts, in general, may lack.[27] The Court further held that the duty to exhaust internal remedies should not be rigidly imposed, and that the duty is not absolute.[28] There can be exceptional circumstances where the court would allow an applicant to approach a review court directly, should the internal remedy in question not be effective, or its exhaustion futile.[29]

[20] Para 12.
[21] Para 12.
[22] Para 13.
[23] Paras 14-15.
[24] Paras 18-20.
[25] Para 33.
[26] See also heading 5 3 3 in chapter 3.
[27] 2010 4 SA 327 (CC) paras 36-37.
[28] Para 38.
[29] Paras 38-39.

Secondly, the Court interpreted section 7(2) to the effect that it does not exclude a court's review jurisdiction. Rather, a court must exercise its review powers in one of two situations: (a) once all internal remedies has been exhausted, or (b) when exceptional circumstances are found to exist.[30]

In terms of section 8 itself, the Court held that it qualifies as an "internal administrative review and appeal" procedure for the purposes of section 7(2) of PAJA and may be used to challenge administrative decisions taken under the Immigration Act.[31]

Section 8 provides two internal mechanisms for review and "[t]he procedure applicable in a particular case will depend on the nature of the administrative decision."[32] The first channel is section 8(1) which provides two routes for appeal, depending on the circumstances. Section 8(1)(a) affords a person who is refused entry or found to be an illegal foreigner to apply, in writing, for review to the Minister.[33] Nevertheless, if such person arrived on a conveyance set to depart, such individual shall depart on said conveyance while the application is referred to the Minister with urgency, and await the Minister's decision, abroad.[34] However, in terms of section 8(1)(b), in any other case, the affected person has three days to apply to the Minister for review and may not be deported "unless and until the Minister has confirmed the decision."[35]

The second channel, section 8(4), stands in direct contrast to section 8(1):

> "In all cases other than those contemplated in section 8(1), where a decision has materially and adversely affected a person's rights, the decision shall be communicated in the prescribed manner and reasons shall be furnished. Under section 8(4), the affected person may, within 10 working days, request a review or appeal to the Director-General. Within a further 10 days of the receipt of the Director-General's decision, the person may seek a ministerial review or appeal."[36]

[30] For what qualifies as exceptional circumstances, please see heading 5 3 3 in chapter 3.
[31] 2010 4 SA 327 (CC) para 50.
[32] Para 51.
[33] Para 51.
[34] Para 51.
[35] Para 51.
[36] Para 52.

This has the result that section 8(1) is "more urgent and provides aggrieved parties with a direct route to the Minister."[37] This indicates that urgency may play a role in determining which route to follow.

Accordingly, the Court held that "[t]he internal remedies under section 8 of the [Immigration] Act illustrate the value and importance of a tailored remedial structure designed to cure a specific administrative irregularity."[38] The Court further believed that the procedure under section 8(1) was the applicable route to follow in the applicants' case, and proceeded to consider the facts in light thereof.

5 3 Insight gained from the immigration context

The Court's emphasis on "the value of a tailored remedial structure"[39] speaks to a broader issue often emphasised in this thesis. While this thesis wants to determine the basic principles that must inform a uniform system of internal controls, when such a system is implemented by the state, the remedies created under it must be capable of addressing a wide range of issues. Therefore, it must be capable of sometimes addressing very specific needs, and not just apply broadly, being incapable of providing appropriate relief.[40]

It is further important to note that the distinction between sections 8(1) and 8(4), speaks to a further criteria for an effective internal remedy: section 8(1) provides a direct route to the Minister, while section 8(4) requires one to first apply to the Director-General, where after one may appeal to the Minister. This supports the argument made in chapter 5,[41] that it is acceptable for a remedy to be limited to a specific set of aggrieved parties. Internal remedies should sometimes be capable of assessing whether someone requires a form of relief, either more urgently in one situation than another, or more broadly, a form of relief relevant to them, but wholly inapplicable in another situation.

Accordingly, while internal remedies should preferably be formulated according to a step-by-step procedure, as seen for example in section 8(4)-8(7) of the Immigration Act, the state must, nevertheless, be cognisant of the fact that certain arms of the public administration may require internal remedies closely tailored to their needs, and

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[37] Para 53.
[38] Para 54.
[39] Para 54.
[40] 2010 4 SA 327 (CC) para 44: the Court emphasises that an internal remedy is only effective if it can provide relief akin to that provided by a court. See heading 5 3 3 in chapter 3.
[41] See heading 4 6 in chapter 5.

perhaps more flexible than those of another arm of the public administration. Therefore, as is the case with the Immigration Act, the state must formulate remedies in accordance with the specific needs of each arm of the public administration. This will be necessary to enable the effective functioning of the public administration, and the realisation of the vision of administrative justice as contained in section 33 of the Constitution.

6 Section 18 of the Social Assistance Act 13 of 2004

6 1 General

Section 27(1)(c) of the Constitution provides that: "[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance." In line with this provision, South Africa established one of the most comprehensive social assistance programs in Southern Africa, which "consists of means-tested grants to designated groups, namely persons with disabilities, older persons and children."[42] In the 2020 budget speech, the Minister of Finance announced that social grants would increase by between 4% and 4.7% over the next financial year and projected an additional one million grant recipients by 2022/23.[43] This would mean that 19 million people would be receiving social grants by 2022/23.[44]

With such a large group of grant recipients, the Department of Social Development and its associated agencies requires considerable regulation. Thus, a number of statutes have been promulgated, including the Social Assistance Act 13 of 2004 ("Social Assistance Act"), as amended by the Social Assistance Amendment Act 5 of 2010.

For the purposes of this thesis, focus will be specifically on section 18 of the Social Assistance Act, an appeals mechanism for those aggrieved by decisions taken under the Act. Section 18 provides:

> "(1) If an applicant or a beneficiary disagrees with a decision made by the Agency in respect of a matter regulated by this Act, that person or a person acting on his or her behalf may, within 90 days of his or her gaining knowledge of that decision, *lodge a written application to the Agency requesting the Agency to reconsider its decision in the prescribed manner*.

[42] E Kaseke "The Role of Social Security in South African" (2010) 53 *Int'l Soc. Work* 159 160.
[43] Anonymous "Social Grants Increased" (26-02-2020) *SAnews* <https://www.sanews.gov.za/south-africa/social-grants-increased> (accessed 04-05-2020).
[44] Anonymous "Social Grants Increased" *SAnews*.

(1A) If an applicant or a beneficiary disagrees with a reconsidered decision made by the Agency in respect of a matter contemplated in subsection (1), that person or a person acting on his or her behalf may, within 90 days of his or her gaining knowledge of that decision, *lodge a written appeal with the Minister* against that decision, setting out the reasons why the Minister should vary or set aside that decision.

(2) The *Minister may*-

(a) upon receipt of the applicant's or beneficiary's written appeal and the Agency's reasons for the decision *confirm, vary or set aside* that decision; *or*

(b) *appoint an independent tribunal to* consider an appeal contemplated in subsection (1A) in the prescribed manner and that tribunal may, after consideration of the matter, *confirm, vary or set aside* that decision.

(3) If the Minister has appointed an independent tribunal in terms of subsection (2)(b) all appeals contemplated in subsection (1A) must be considered by that tribunal.

(4) Notwithstanding subsection (1A), the independent tribunal may in the prescribed manner condone any late application by an applicant or a beneficiary" (emphasis added).

Section 18 thus provides a mechanism with which one may appeal to, in writing, the Agency and thereafter to the Minister, and grants the Minister the power to either consider the appeal on his/her own, or to appoint a tribunal to hear the appeal.

It is further important to note that the Minister has promulgated regulations to give effect to the provisions of the Social Assistance Act, although these have proven troublesome in the past.[45] However, in 2011 regulations were finally promulgated which dealt specifically with the lodging of appeals and reconsideration of grant awards by both the South African Social Security Agency ("SASSA"), as well as the Independent Appeals Tribunal. It is a 41 page document, setting out a step-by-step procedure to be followed by all those involved in the reconsideration of grant awards.

Section 18 of the Social Assistance Act, as considered and applied by the courts, will be discussed below.

[45] Regulations were first published in GN R 8165 in *GG* 27316 of 22-02-2005. However, in *Cele v South African Social Security Agency and 22 Related Cases* 2009 5 SA 105 (D) paras 9-10, Wallis AJ found that those regulations were never intended by the Minister to be in force. They were merely published for public comment, and that there was general confusion as to which regulations were actually meant to give effect to the provisions of the Social Assistance Act. However, five months after this judgment, regulations were promulgated on 22 August 2008. See GN R 898 in *GG* 31356 of 22-08-2008. Further, on 19 September 2011, the Minister promulgated the "Regulations relating to the Lodging and Consideration of Applications for Reconsideration of Social Assistance Application by the Agency and Social Assistance Appeals by the Independent Tribunal." See: GN R 746 in *GG* 34618 of 11-09-2011. See the discussion under 6 2 as a whole.

6 2 Cele v South African Social Security Agency and 22 Related Cases

6 2 1 Facts

The case of *Cele v South African Social Security Agency and 22 Related Cases* ("*Cele*"),[46] concerns 23 different matters brought either against the Minister of Social Development or SASSA, each one on one of three grounds, namely: (a) the applicant receiving no formal response to their application for one or other form of social assistance grant, (b) failure to put in place arrangements to hear an appeal against a refusal to award a disability grant, or (c) failure to provide an applicant, who received one or other social assistance grant in the past, with reasons for stopping said grant payments.[47]

Wallis AJ decided to consider the 23 matters together, delivering a judgment highly critical of, firstly, the high number of social assistance related matters currently causing congestion of the court roll in the Kwa-Zulu Natal High Court Division,[48] secondly, failure of these matters to identify the relevant statutory provisions on which reliance is placed,[49] and thirdly, the legal practitioners who seem to fail to perform their duties with the high level of professionalism and attention to detail required by their respective clients.[50]

In spite of the difficulty the court faced in determining which statutory provisions were applicable in the current matter, Wallis AJ briefly commented on the applicability of section 18 of the Social Assistance Act, as well as PAJA. These comments will be discussed below, as they provide insight for the subsequent case discussion.

6 2 2 Section 18 as an effective internal remedy

By the time the court rendered judgment in 2008, no regulations had yet been promulgated under the Social Assistance Act which came into force on 1 April 2006. The court recognised that the reason grants are now provided by national government, was due to the fact that the administration thereof faced significant challenges when it was under the control of provincial governments. This prompted the courts and national government to intervene, and bring the administration of grants under the

[46] 2009 5 SA 105 (D).
[47] Paras 1-3.
[48] Para 12.
[49] Paras 6-8.
[50] Paras 8, 11, 12-14.

control of national government and SASSA.[51] However, with no regulations yet in force, Wallis AJ held that a failure to promulgate regulations could only be forgiven if the social assistance system functioned effectively based solely on the provisions of the Act itself.[52] Yet, this was not the case. While section 18 of the Social Assistance Act provides an internal appeals mechanism, "no independent tribunal has been established in terms of s18(2)(b) of the 2004 Act to consider appeals."[53] The court held that the lack of regulations meant that administrative problems originally experienced at provincial level, was now merely transferred to national level.[54]

It is my opinion that this shows that regulations must be put in place to give broader effect to the provisions of the Act, enabling those personnel who must administer the grant system, and especially the appeals process, to perform their duties with the full knowledge of what is expected of them.

Nevertheless, recognising that section 18 is in place to regulate internal appeals, Wallis AJ was at pains to stress that litigation must remain a measure of last resort as long as other measures could first be exhausted to resolve the matter.[55] The court did, however, find it puzzling that in none of the papers before it, was reference ever made to the provisions of PAJA. Relying on submissions made by *amicis curiae*, the court held that a failure to provide reasons is specifically dealt with in section 5 of PAJA, and that in:

> "administering social assistance grants and providing for an appeal against the refusal of such grants, SASSA and the Minster of Social Development are exercising public powers and performing public functions in terms of legislation."[56]

Accordingly, PAJA was applicable to the matters before the court, and should inform the administration of awarding and refusing social assistance grants, as well as the internal appeal mechanisms in place to challenge those decisions.

Therefore, this case stressed the importance of providing an administrative system capable of both functioning effectively, as well as addressing the needs of those accessing the system. This point shall be elaborated on below, subsequent to the following case discussion.

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[51] Para 15.
[52] Para 16.
[53] Para 16.
[54] Para 16.
[55] Para 27.
[56] Para 47.

6 3 Minister of Social Development v Mpayipheli

6 3 1 Facts

Minister of Social Development v Mpayipheli ("*Mpayipheli*"),[57] concerned an appeal to the full bench of the High Court, also concerning section 18 of the Social Assistance Act. On 28 August 2014, the respondent submitted an application for a disability grant, which was refused.[58] The respondent applied for reconsideration under section 18(1) of the Social Assistance Act, but SASSA dismissed it on the grounds that the application was not lodged within the prescribed 90 day period.[59] On 1 June 2015, the respondent lodged an appeal with the Minister in terms of section 18(1A).[60] On 29 June 2015, the respondent received a letter requiring his attorneys to furnish the department with certain documentation as required under regulation 14(2) of the 2011 regulations,[61] which was duly provided on 15 July 2015.[62] Believing the appeal will now run its course, the respondent waited for the outcome of the appeal. However, by 8 October 2015, no decision had yet been received from the department.[63] On the same day, the attorneys for the respondent enquired as to whether the Minister had reached a decision. On 13 October they received an email from Tefu Khomotso, a legal administrative officer, informing them that the application for reconsideration was lodged outside the 90 day period. Thus, the respondent was advised to reapply for the desired social assistance grant, seeing that SASSA's legislation does not permit condonation of late reconsideration applications.[64]

The respondent approached the court *a quo* for judicial review, the legal question being whether the Minister had in fact taken a decision on appeal. The court *a quo* held that the Minister had not. The court found in favour of the respondent and ordered the Minister to decide the appeal within 30 days.[65] With leave of the court, the Minister appealed against the "whole of the judgment and order."[66]

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[57] 2018 ZAECMHC 31.
[58] Para 1.
[59] Para 3.
[60] Para 4.
[61] GN R 746 in *GG* 34618 of 11-09-2011.
[62] 2018 ZAECMHC 31 para 5.
[63] Para 6.
[64] Para 6.
[65] Para 1.
[66] Para 1.

6 3 2 Section 18 as an effective internal remedy

On appeal, the court pointed out that the Minister can either consider the appeal on his/her own, or appoint an independent tribunal to do so. It then considered the submissions made by counsel.

Counsel for the appellants argued that there could be no decision to appeal against, as SASSA had taken no decision due to the reconsideration being lodged with SASSA outside the 90 day period.[67] Counsel further argued that the letter dated 13 October 2015, written by Tefu Khomotso, was a decision as contemplated in section 18(1A), as it cannot be expected of the Minister to write each and every appeal letter herself.[68]

The court rejected both of the above-mentioned arguments. Firstly, SASSA had clearly recorded a decision regarding the reconsideration, stating in their letter that:

> "we do not award you the grant. Your application for reconsideration was lodged outside the prescribed 90 day period […]. If you wish to appeal against the above decision, you may appeal to the National Minister of Social Development in writing against such decision within ninety (90) days after the date on which you were notified of the decision."[69]

Accordingly, there was a decision to appeal against. Secondly, the letter of 13 October 2015 does not:

> "purport to have been written on the instructions of the Minister. A functionary, whose power the legislation has conferred, must himself/herself exercise the power unless such power has been delegated to someone else."[70]

While the Minister does not have to write the letter which informs an applicant of the decision herself, she must nevertheless be the one who decides the appeal, and then instruct an official to record her decision.[71] A departmental official is "not entitled to arrogate to himself powers which have not been conferred on him by law."[72] Thus, the letter written by Tefu Khomotso cannot be a decision as envisioned in section 18(1A) of the Act.

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[67] Para 11.
[68] Para 10.
[69] Para 11.
[70] Para 13.
[71] Paras 10 & 14.
[72] Para 18.

The court held that the Minister had failed to fulfil her obligations under the Social Assistance Act, and acted unlawfully.[73] Further, because Tefu Khomotso was not empowered by the Act to decide an appeal, that decision was also unlawful.[74]

The court upheld the decision of the court *a quo*, and dismissed the appeal.[75]

6 4 Insight gained from the Social Assistance context

A number of important principles may be drawn from the case discussion above, and which will inform the formulation of the criteria for a uniform system of internal controls.

Firstly, the decision of *Cele* specifically stated that litigation should always be a measure of last resort, as long as other methods exist with which a matter may be resolved.[76] This implores one to continue to search for alternative methods of dispute resolution and the implication is that an alternative to litigation should be found as a general approach to resolving administrative disputes. This is critical, seeing that large sections of society must still overcome barriers before accessing the court system.

Secondly, when formulating the criteria and measures which will be necessary to implement a system of internal controls, the state must take its lead from both section 33 of the Constitution, as well as PAJA. PAJA is the principal piece of legislation aimed at giving effect to the right to administrative justice.[77] This means that a uniform system of internal controls will first and foremost be regulated by PAJA and the principles included therein. The Constitution must inform the decision-making of the state.

Thirdly, the Minister of Social Development and the department, dragged their feet when it came to the implementation of regulations to give effect to the Social Assistance Act. For the period of 1 April 2006 to December 2006, there was general confusion, as regulations which appeared to be in force, turned out to have been published merely as draft regulations.[78] Furthermore, no general regulations were in force until August 2008, and no formal set of regulations regulating appeals until 2011. This speaks to a larger problem, in that the public administration must often cope with a failure on the part of the executive to timeously enact the measures and provide the regulations necessary to allow it to function effectively. Thus, should the state proceed

[73] Para 21.
[74] Para 21.
[75] Para 23.
[76] 2009 5 SA 105 (D) para 27.
[77] See heading 4 4 in chapter 2.
[78] 2009 5 SA 105 (D) para 9.

to implement a uniform system of internal controls, the above must serve as a warning of what could ensue if there is a failure to plan meticulously at the start of that process and to ensure that all components of a contemplated administrative decision-making regime are put in place to enable the entire system of function effectively, including dealing with disputes.

Fourthly, the 2011 regulations is a 41 page document. This illustrates that internal remedies requires a well-formulated and structured set of principles. Meaning, a step-by-step process must be provided, which members of the public and the administration may use to effectively utilise and implement such remedy.[79] Thus, more broadly, a uniform system of internal controls will similarly require a step-by-step formulation, and *Mpayipheli* clearly illustrates this point.

Mpayipheli shows that the office-bearers who must implement and exercise powers under a uniform system of internal controls, must know exactly what is expected of them, as well as the limits of their individual powers. This falls within the principle of lawfulness, a general principle of administrative law, and which is listed in section 33 of the Constitution. The state must be cognisant of the fact that, with the implementation of a uniform system, will come the responsibility to consider ahead of time, both the chain of command and the rules and principles necessary, to allow administrators to best perform their duties under said system. Appropriate delegations of authority must be designed and implemented, which also implies that the requisite capacity must be available within the decision-making entity to fully implement the contemplated system.

With this in mind, it is necessary to determine whether there are further criteria to consider.

[79] The argument can be made that such a long document can further cause confusion, seeing that it might not be accessible and be difficult to interpret, thus alienating the very people it is supposed to assist. While this is a possibility, I emphasise the length and formulation of the document in support of the very specific argument that internal remedies must be clearly formulated and explain its process in a clear manner. I am not suggesting that all internal remedies will require such a lengthy document, nor am I overlooking the possibility of interpretive problems that this may cause. This is further explained under heading 8 below.

7 Section 40 of the South African Schools Act 84 of 1996

7 1 General

More than 20 years after democracy, South Africa's education system continues to struggle with both the legacy of Apartheid, as well as the numerous challenges linked to transformation, redistribution and a lack of resources. Arendse writes that:

> "[t]he disturbing reality is that the majority of learners who are branded as 'among the worst in the world' are located at the former black schools in contrast to learners at former white schools who are on average outperforming their counterparts at the previously disadvantaged schools."[80]

Despite the government's implementation of laws and policies to ensure that public funding is aimed at redressing the disparities that exist between different schools and communities, it is a reality that the financing of public schools is still largely reliant on school fees.[81] The amount of fees charged is determined by the parent community of the area serviced by the school and "there is a growing concern that the public funding system is reinforcing the existing inequality between former black and white schools."[82] This argument is supported by the fact "that wealthy schools can sustain their position of privilege by charging high school fees which enable them to operate on budgets far exceeding those of poor schools which cannot charge similar amounts."[83]

This means that the ability of parents or guardians to pay schools fees, forms an important consideration in determining the school to which they will send their children. With South Africa's unemployment rate reaching 30.1% in the first quarter of 2020, and more than 50% of South Africans living below the upper-bound poverty line,[84] there are many parents who will have no other option but to place their children in no-fee schools. For those who might wish to send their children to former Model C Schools,[85] or fee-paying schools, the payment of fees will become a monthly financial concern.

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[80] L Arendse "The School Funding System and its Discriminatory Impact on Marginalised Learners" (2011) 15 *LDD* 339 339-340.
[81] 340, see also: D Roithmayr "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education" (2003) *SAJHR* 382 382.
[82] Arendse (2011) *LDD* 340.
[83] 340.
[84] See heading 4 above.
[85] Former Model C Schools, are former white-only schools, and generally regarded as adequately resourced, if compared to township or rural schools. See Arendse (2011) *LDD* 343.

Thus, until such time that the school funding system is reconsidered, fees for public schools remain in place, and if parents should wish to send their child to a "more advantaged" school, higher school fees will be a reality. In this context it may not be possible for a parent to pay the fees or a dispute may arise regarding the amount of fees payable. In such circumstances, parents and schools will have to turn to section 40 of the South African Schools Act 84 of 1996 ("SASA"), as well as the Regulations relating to the Exemption of Parents from Payment of School Fees in Public Schools ("Exemption Regulations").[86]

Section 40 of SASA provides:

> "(1) *A parent is liable to pay the school fees* determined in terms of section 39 *unless* or to the extent that he or she has been *exempted from payment* in terms of this Act.
>
> (2) A *parent may appeal to the Head of Department* against a decision of a governing body regarding the exemption of such parent from payment of school fees.
>
> (3) In deciding an appeal referred to in subsection (2), the *Head of Department must follow due process* which safeguards the interests of the parent and the governing body" (emphasis added).

Regulation 5 of the Exemption Regulations sets out four categories of possible exemptions, whereas regulation 6 provides that a Governing Body has 30 days from receipt of the application to make a decision. Furthermore, regulation 8(1) holds that: "[a] parent who is dissatisfied with the decision referred to in regulation 6(1) may, in writing and within 30 days after receipt of the notification of that decision, appeal to the Head of Department" against the decision of the Governing Body. Regulations 8(2)-8(6) then provide the further steps to be followed when lodging an appeal.

The effectiveness of section 40 as an internal remedy, in conjunction with the Exemption Regulations, will accordingly be discussed.

7 2 Head, Western Cape Education Department v S

7 2 1 Facts

In *Head of Department: Western Cape Education Department v S (Women's Legal Centre as Amicus Curiae)* ("*HoD v S*"),[87] the court had to determine:

> "whether liability of biological parents for school fees at public fee paying schools, as provided for in s 40(1) […], is joint liability, or joint and several liability, and if the latter,

[86] GN R 1052 in *GG* 29311 of 18-10-2006.
[87] 2017 ZASCA 187.

> whether the consequences are such as to impact disparately, negatively and ultimately unlawfully on single parents."[88]

Ms S applied for an exemption under the Exemption Regulations, as the yearly school fee in 2011 stood at R13 250, and Ms S's yearly income stood at R160 284, in addition to the R33 540 received, annually, from her former spouse, for child maintenance.[89] When applying for an exemption, a parent must provide the school with the combined income of both parents, as required by the formula under regulation 6.[90] This, Ms S believed was unfair, as it cannot be expected of her to provide the school with the financial particulars of her former spouse.[91] Accordingly, she argued that the regulations fail to make provision for single parents, and that the exemption should be capable of being calculated on the basis of joint liability, not joint and several liability.[92] In her view, it amounted to an infringement of "her right, relative to her circumstances, to apply as individual for a fee exemption."[93]

7 2 2 Is section 40 an effective internal remedy?

The court took note of the fact that Ms S's application had "far reaching implications for a large number of parents at fee-paying schools throughout the Western Cape".[94] In particular:

> "The failure of the education authorities to comply with their obligations to ensure that school fees are not an obstacle to access to education, is a matter of considerable public interest, which needs to be remedied without delay."[95]

This links back to my earlier point that the economic means and circumstances of the majority of South Africans imply that the payment of school fees is a monthly financial concern, and measures must be in place to alleviate such concerns where possible. While section 40 and the Exemption Regulations purports to be that measure, this case exposed flaws within the administration of section 40 as an internal remedy. It was the task of the SCA to remedy those flaws.

Firstly, the court held that on proper interpretation of section 40(1), as read with sections 38 and 39, as well as the definition of parent in section 1, the provision must

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[88] Para 1.
[89] Para 9.
[90] Para 10.
[91] Para 15.
[92] Paras 10 & 33.
[93] Para 10.
[94] Para 32.
[95] Para 32.

imply joint and several liability for parents for the payment of school fees.[96] However, this would mean that the Act fails to cater for single parents.

Secondly, due to the above, the court provided an in-depth discussion of regulation 1 and 6. In light thereof, the court concluded that it is within the powers of a School Governing Body to grant a conditional exemption to parents in the position of Ms S.[97]

The court opined that "where the combined gross income of both the parents is the denominator, a parent cannot be granted a total or partial exemption where he or she is unable to or does not provide the gross annual income of the other parent."[98] However, regulation 1 provides a conditional exemption for a parent who does not qualify for any exemption, but who does supply information indicating his or her inability to pay school fees due to personal circumstances beyond his or her control.[99] Such conditional exemptions are granted "with the proviso that the parent agrees to conditions for the payment of the school fees."[100] Thus, the court held that a conditional exemption may be awarded to parents in the position of Ms S, under which they shall be entitled to the total or partial exemption that they would have been entitled to if they had been the only parent of the learner concerned.[101]

The court concluded that the school and its governing body had subjected Ms S to "repeated violations of her constitutional and statutory rights."[102] She was entitled to have her fee exemption applications processed in line with the provisions of the Act and Exemption Regulations, as interpreted and set out by the SCA. Further, while parents under section 40(1) of SASA remain jointly and several liable, it is within the powers of a School Governing Body to grant a conditional exemption under regulation 1 of the Exemption Regulations, in line with the courts' order.

7 3 Insight gained from the school fee context

The discussion of the above-mentioned case allows one to highlight a number of points.

[96] Paras 60 & 83.
[97] Paras 65-75.
[98] Para 69.
[99] Para 70.
[100] Para 70.
[101] Paras 72, 74 & 83.
[102] Para 83.

Firstly, the Exemption Regulations are contained within a 26 page document.[103] This once again supports the afore-mentioned principle under heading 6 4 above, that internal remedies must be provided for in a well-formulated and structured document, which provides a step-by-step procedure for its implementation and utilisation. It cannot be that the only component of an internal remedy which is well-formulated, is the main statutory provision which contains the appeal mechanism itself. As illustrated by *HoD v S* (and *Mpayipheli* in relation to section 18 of the Social Assistance Act), reliance will often be placed on the other provisions of the Act or regulations as well, and thus the internal remedy as a whole will need to be clearly formulated and set out. Along with clarity in the formulation of the actual internal remedy itself, the requisite administrative and support mechanisms must also be in place to ensure that the internal remedy can be effectively implemented and that aggrieved parties, especially those with limited means, can effectively gain access to it.

Secondly, the case of *HoD v S* once more supports the argument made in relation to section 8 of the Immigration Act, and the Constitutional Court case of *Koyabe*.[104] It was emphasised above,[105] that the state must recognise that a generally-formulated set of internal controls will not necessarily be capable of addressing the needs of the public across all sets of prevailing circumstances. As seen in *HoD v S* (and *Koyabe*), internal remedies should sometimes be capable of assessing whether someone requires a form of relief in their circumstances, which might be wholly inapplicable in the circumstances of another. Closely-tailored remedies for specific needs might be necessary in certain circumstances. It is therefore important that the state consult broadly, and plan meticulously, before formulating principles, and implementing a uniform system of internal controls. Furthermore, in its implementation, the controls must allow for individualised attention to disputes and for the unique circumstances of a particular case to be effectively accommodated.

Lastly, this case illustrates that even if the state does everything it can, and a uniform system of internal controls is implemented with the best of intentions, situations will arise in the future, where amendment of principles will be required. As the legal landscape develops and changes, and as transformation of societal norms

[103] Please note my earlier comment under heading 6 4 above, with regards to the interpretive problems which lengthy documents may cause.
[104] 2010 4 SA 327 (CC).
[105] See heading 5 3.

occurs, situations will arise where new principles and rules are required, where new sets of circumstances will need to be recognised, and where the state will need to provide for those prevailing circumstances within its internal controls framework. The entire system must thus remain flexible and open for ongoing reforms.

8 Criteria drawn from the South African context

In light of the discussion above, it is suggested that a further four criteria exist which should inform the decision-making of the state when formulating internal remedies:[106]

8 1 A right to reasons

It is important that a right to reasons should be recognised as part of the internal control mechanism. Currently, section 5 of PAJA provides that when an initial decision is taken by the public administration, and if it does not furnish the affected party (or parties) with reasons of its own accord, it must furnish the relevant party with adequate and written reasons, if so requested within 90 days of the decision having been taken. However, in each of the provisions considered in this chapter, provision was in fact made for the administrator to provide the reasons for their decision to confirm, vary or overturn the impugned decision. To require that a right to reasons be given effect to, will enable the public administration to create and enforce a culture of justification which will assist in the realisation of a public administration which is open, efficient, transparent and accountable.

8 2 Clear and structured formulation

Internal remedies require a clear and structured formulation. A step-by-step procedure should be provided, which provides clarity regarding each step of the process. This means that the necessary administrative and support structures must be in place, to ensure that all parties involved knows exactly what is expected of them at each step of the process.

8 3 Robust and tailored remedies

There is a need for the state to be robust in their formulation of internal remedies. While one, clearly formulated, internal remedy might be capable of providing appropriate relief across the board in one department of the public administration, the same could not necessarily be said in relation to another department. Therefore, some

[106] Please note that all nine criteria are summarised in chapter 7.

areas of the public administration might require more than one form of internal control, seeing that different circumstances may require different forms of relief.

Further, situations might arise in which someone needs to lodge an appeal more urgently than in another situation. Internal remedies might need to be tailored to specific needs, and even contain limitations as to the parties for which it caters. Thus, the state must take care to consult broadly and determine what principles might be required in one department of the public administration that might not be correct or effective in another.

8 4 Continued review of internal remedies

The state will need to continuously review and update internal remedies. The future is unpredictable, and as the legal landscape develops and changes, and as transformation of societal norms occurs, situations will arise where new principles and rules are required, where new sets of circumstances will need to be recognised, and where the state will need to provide for those prevailing circumstances within its internal controls framework. The implementation of a uniform system of internal remedies requires a flexible and open system wherein the state is aware of the continued need to update remedies as the need arises.

Accordingly, there is a direct link between this criterion and the one mentioned directly above at heading 8 3. Chapter 4 of this thesis emphasised the dual nature of administrative law,[107] holding that administrative law aims to both empower the administration, but also exercise control over it. Considerable debate exists between the so-called red-light theorists (control) and green-light theorists (empowerment) as to which one of these components are more important. However, if the state formulates robust and closely-tailored remedies (8 3 above), as well as maintain an open and flexible system in which internal remedies are continuously updated, then one can ensure that the gap between empowerment and control disappears. Internal remedies that comply with these criteria, will be able to ensure a viable alternative to judicial review, enabling the empowerment and control components of administrative law to function simultaneously.

[107] See heading 3 in chapter 4.

9 Conclusion

This chapter aimed to build on the discussion in chapter 5, in order to provide a comprehensive criteria for the implementation of a uniform system of internal remedies. Not all members of the public are equal, and there continues to be people who are marginalised, and who fail to gain access to the justice system. Therefore, if reliance can be placed on internal remedies, it could present an opportunity to provide them with access. The criteria identified in this chapter thus constitute an important additional layer to a potential internal remedies regime in South African administrative law.

Accordingly, some mechanisms which already exist and which aim to assist the disadvantaged, were discussed. These mechanisms aim to provide a more level playing field, in line with the vision of Transformative Constitutionalism. However, not all internal controls are effective, and they sometimes contain gaps, as illustrated in the immigration, social assistance and school fee contexts.

It is for this reason that each section contained a discussion on possible solutions, as well as the lessons drawn from the discussion of case law, to assist the state in their formulation of the criteria for effective internal remedies. It is important to see where improvements can be made in the future.

In the following (concluding) chapter, I will summarise the arguments made in this thesis, and present my recommendations and final criteria for a uniform system of internal controls.

Chapter 7: Conclusion

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1 General

The enactment of section 7(2)(a) of PAJA overhauled the common law duty to exhaust available internal remedies. Firstly, there is now a "positive and unequivocal obligation"[1] to exhaust internal remedies, irrespective of the circumstances. Secondly, a review court may not review administrative action until internal remedies have been exhausted (unless an exemption is granted).[2] Lastly, in order for an exemption to be granted, the applicant must prove the existence of exceptional circumstances justifying why he or she should not be required to first exhaust an available internal remedy.[3]

This illustrates that the duty to exhaust any and all available internal remedies is strictly enforced. It places renewed pressure on an aggrieved party to first approach the public administration, utilising its procedures, before approaching the court. This thesis regards this as a positive development, seeing that internal remedies are usually more informal than judicial proceedings,[4] allowing a more affordable and expedient manner of obtaining relief, which "can address a wider range of issues regarding administrative action."[5]

Nonetheless, South Africa has no uniform system of internal controls.[6] A party affected by an administrative action has no right to an internal remedy, nor is there an obligation on a particular part of the public administration to have internal remedies in place.[7] The creation of a "more coherent and uniform system of internal remedies"[8] was considered during PAJA's drafting process.[9] However, this was left to the discretion of the Minister of Justice, who was afforded the discretion in terms of PAJA, to appoint an advisory council who could advise on "any improvements that might be made in respect of internal complaints procedures".[10] To date, no steps to this effect have been taken.[11] Therefore, whether an aggrieved party will have an internal remedy

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[1] C Plasket "The Exhaustion of Internal Remedies and s7(2) of the Promotion of Administrative Justice Act 3 of 2000" (2002) 119 *SALJ* 50 52; G Quinot "Regulating administrative action" in G Quinot (ed) *Administrative justice in South Africa: an introduction* (2016) 95 115.
[2] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 115.
[3] 115-116.
[4] 102.
[5] 102.
[6] 100.
[7] 100.
[8] 101.
[9] 101.
[10] S10(2)(a)(ii) of PAJA.
[11] Quinot "Regulating administrative action" in *Administrative justice in South Africa* 101.

to exhaust depends on the "particular legislative framework in terms of which the administrative action"[12] was taken.

The above formed the basis for formulating the two distinct components of which this thesis was comprised. Chapters 2, 3 and 4 provided the framework for the first component, and set out the arguments in support of the implementation of a uniform system of internal controls in South African administrative law. Secondly, chapters 5 and 6 addressed the second component, by setting out the content, requirements and scope of an effective internal remedy.

Below will follow a summary of the main points of each chapter, followed by my recommendations for the criteria of a uniform system of internal controls, and possible formulations for an internal remedy.

2 Summary of chapters

2 1 Chapter 2

Between 1990 and 2000, South African administrative law experienced a shift towards an all-encompassing concept known as administrative justice. This intimated that one's focus could no longer be solely on judicial review. Rather, alternative methods for obtaining administrative justice had to be scrutinised.

The hope was that PAJA, together with section 33 of the Constitution would enable this. However, Cora Hoexter opines that PAJA is a lost opportunity, for failing to provide an integrated system of administrative law where judicial review is no longer the primary mechanism for obtaining administrative justice.[13]

Instead PAJA, in light of section 33, has facilitated the clear shift towards a culture of justification to foster accountability in the public administration. This means that the public administration itself, should realise that it has a duty to justify why it took a certain decision or carried out a specific action. It cannot be that the public administration only justifies its actions when requested to do so by the public.

2 2 Chapter 3

This chapter provided an in depth discussion on judicial review under both the common law and PAJA.

[12] 100.
[13] See heading 5 3 2 in chapter 2.

Focussing specifically on PAJA,[14] there are two procedural requirements that must be complied with before approaching a court for judicial review. Firstly, section 7(1) requires an applicant to launch the application for review within a specified time-period.[15] Secondly, any and all available internal remedies need to be exhausted in light of section 7(2)(a), and if they are not, the court must direct the applicant to exhaust them in terms of section 7(2)(b), unless an exemption were granted under section 7(2)(c).

This means that, contrary to the common law, there is now a strict duty to exhaust internal remedies under PAJA.

However, there seems to be confusion on what is meant by the term “exhaustion”, especially where more than one available internal remedy exist. While the courts have clearly specified what the term does not mean, the link between the words “all” and “exhaustion” remains unclear. Nevertheless, it is my interpretation that what is meant by the exhaustion of “any and all” internal remedies, will heavily depend on the context of the particular matter in question.

2 3 Chapter 4

This chapter set out the rationale behind the creation and implementation of a duty on the state to provide a uniform system of internal remedies. The rationale is dependent on four main points. Firstly, section 33 of the Constitution, the right to administrative justice. Section 33(3)(a) recognises that review does not have to occur by means of the courts alone, and section 33(3)(c) simultaneously recognises that the public administration must function as efficiently as possible. Chapter 4 argued that emphasis on the efficiency of the administration, together with methods other than judicial review, is an argument in favour of a system of internal remedies.

Secondly, the project of Transformative Constitutionalism envisages that the legal culture of South Africa must change, which implies that the Constitution itself should be central to any and all decisions, whether taken by the judiciary or those serving in the executive. A system of internal remedies, together with the right to reasons under section 5 of PAJA, will enable the public administration to create and enforce a culture of justification, which will assist in the realisation of a public administration which is open, efficient, transparent and accountable.

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[14] For a discussion of the common law, see heading 5 in chapter 3.
[15] Please see heading 5 2 in chapter 3 for an in depth explanation of these time periods.

Thirdly, poverty and its impact on administrative justice must be considered. South Africa's unemployment figure stood at 30.1% in the first quarter of 2020, and roughly 55.5% of the population were living below the upper-bound poverty line. This means that the majority of South Africans lack the financial means to access justice through the court system, while being highly dependent on various public social welfare programmes. Further, even if they could gain access to the courts, the time-consuming and costly nature of judicial review serves as stumbling blocks. Accordingly, other methods for obtaining administrative justice need to be available.

Lastly, the exhaustion of domestic remedies under international law can be applied by analogy to the context of administrative justice. Since the 1960's, there has been a consistent argument in international law, that there should be a recognisable and enforceable duty on states to provide domestic remedies which should first be exhausted prior to approaching an international forum for relief. However, it is peculiar that no similar argument has been made in relation to the exhaustion of internal remedies under PAJA at a national (domestic) level.

2 4 Chapter 5

Should the arguments in chapter 4 be accepted, then the second component of the thesis had to be addressed, namely the content and scope of an effective internal remedy. Chapter 5 set out to provide the general criteria for an effective internal remedy, by comparing (in the procurement context) section 62 of the Systems Act and regulation 49 and 50 of the Supply Chain Management Regulations. This culminated in the formulation of five general criteria, which is summarised under heading 3 below.

2 5 Chapter 6

Chapter 6 built on the arguments in chapter 5, by shifting the focus away from procurement, and focussing specifically on the marginalised sections of South African society. Chapter 6 argued that it is not possible to formulate a further set of criteria for an effective internal remedy, without considering South Africa's poverty figures, persistent income inequality and the general lack of access to the justice system for marginalised sections of society. Accordingly, focus was placed on three diverse internal remedies in the immigration, social welfare and school-fee contexts. By examining these remedies, a further four criteria were identified,[16] which should inform

[16] See heading 3 below.

the state's decision-making when formulating a uniform system of internal remedies that are fit-for-purpose in South Africa.

3 The Criteria for a Uniform System of Internal Controls

Based on the analyses in the preceding chapters, the following nine criteria can be put forward to frame the creation of internal remedies in the South African administrative context.

3 1 A remedy found in law

An internal remedy is one which is found in law. This has been interpreted to mean that it must be found in statute (or statutory regulations).[17]

3 2 Internal to the administration

An internal remedy is internal to the administration concerned. This implies that in the utilisation and execution thereof, no one other than the aggrieved party and administrative officer concerned, should be involved.[18]

3 3 Available, effective and appropriate

An internal remedy must be available, effective and appropriate for the particular grievance. Thus, it must be akin to the relief provided by a court.[19]

3 4 Speedy resolution of disputes

Internal remedies must be capable of providing for the speedy resolution of disputes. It cannot be subject to the same time-constraints often seen under judicial review.[20]

3 5 A final and binding decision

An internal remedy must be capable of providing a final and binding decision for the parties concerned. Accordingly, the authorised administrator who may confirm, vary or overturn the impugned decision, must be empowered to the extent that their decision is enforceable under the law.[21]

[17] See heading 2 3 in chapter 5.
[18] See heading 2 3 in chapter 5.
[19] See heading 2 3 in chapter 5.
[20] See heading 4 5 in chapter 5.
[21] See heading 4 5 in chapter 5.

3 6 A right to reasons

A right to reasons should be recognised as part of the internal control mechanism. Together with section 5 of PAJA which provides for a right to request reasons, this thesis argues that to require that a right to reasons be given effect to, will enable the public administration to create and enforce a culture of justification which will assist in the realisation of a public administration which is open, efficient, transparent and accountable.[22]

3 7 Clear and structured formulation

Internal remedies require a clear and structured formulation. There needs to be a step-by-step procedure which regulates the entire remedy, and which provides clarity regarding each step of the process.[23]

3 8 Robust and tailored remedies

The state should be robust in their formulation of internal remedies. One internal remedy might not be capable of providing appropriate relief across the board in one department of the public administration. The state must be able to cater for the different needs of different departments, and take note of issues such as urgency, time-constraints, and the possibility of imposing limitations on the use of a particular remedy by some members of the public.[24]

3 9 Continued review of internal remedies

Lastly, the entire system must remain flexible and open for ongoing reforms. The state must continuously reconsider internal remedies to update them as societal norms and needs changes. Mechanisms would possibly have to be amended or updated as circumstances arise for which provision was not previously made. The periodic assessment of the efficacy of particular internal remedies to achieve their stated aims must also form part of the design of the internal remedy regime.[25]

[22] See heading 8 1 in chapter 6.
[23] See heading 8 2 in chapter 6.
[24] See heading 8 3 in chapter 6.
[25] See heading 8 4 in chapter 6.

4 Possible constructions to follow when formulating internal remedies

4 1 General

In light of the nine criteria for an effective internal remedy, I put forward in the section below, some illustrations of what an internal remedy could look like. This will enable the state, those in academia, as well as those accessing and relying on regulations, to see the practical implementation of the nine criteria.

4 2 Blank spaces

Please note that at certain places in the formulations below, blank spaces will appear. This is done because internal remedies are context specific. Thus, because I am not formulating an internal remedy for a specific arm of the public administration, content cannot be provided to that particular blank space.

Further, the formulations are possible constructions to follow as a point of departure. When formulating an actual internal remedy to the stage of completion, its construction and content could vastly differ from the formulations provided here.

Lastly, not all information necessarily have to appear in the internal remedy itself. As seen in the discussion of legislation in chapters 5 and 6, some internal remedies are supplemented by regulations which further elaborate on the information provided in statute. Thus, the formulations below include your basic information.

4 3 Time-periods

The formulation of time-periods is extremely difficult. Almost every internal remedy studied in this thesis contained a different time-period within which the remedy had to be utilised.[26] This also included different time-periods under which the administrator in question had to reach a decision.

It is evident, however, that time-periods must be relatively short, otherwise there would be no difference between approaching a court (judicial review) and approaching the administration (internal remedies). The shortest time-period found is three (3) days, and the longest ninety (90) days. The latter time period is already quite long. My recommendation is that no internal remedy should really exceed such a time-period.

[26] S8(1)(a) of the Immigration 13 of 2002 refers to **3** days, while the remainder of the provision speaks of **10** days; s18(1) of the Social Assistance Act 13 of 2004 provides a **90**-day appeal period (appeal to the Minister); s40 of the South African Schools Act 84 of 1996 provides **no time** period, while regulation 6 provides a School Governing Body with **30** days from receipt of the relevant application, to reach a decision; s62 of the Municipal Systems Act 32 of 2000 requires an appeal within **21** days of becoming aware of the impugned decision.

4 4 Examples of possible formulations

4 4 1 Formulation one

1(1) A person whose rights are affected by a decision taken by a [SPECIFIC DECISION-MAKER], may lodge an appeal with the [NAME OF PERSON MANAGING APPEAL PROCESS] within [NUMBER] days of being notified of the decision, by providing written notice (with accompanying reasons).

(2) The [NAME OF PERSON MANAGING APPEAL PROCESS] must within [NUMBER] days of receiving the notice, acknowledge receipt thereof and refer the matter to the [NAME OF APPEAL AUTHORITY] for consideration.

(3) The [NAME OF APPEAL AUTHORITY] must within [NUMBER] days of receiving notice of the appeal, confirm, vary or revoke the impugned decision.

(4) The decision of the [NAME OF APPEAL AUTHORITY] must be accompanied by reasons.

4 4 2 Formulation two

1(1) An applicant who disagrees with a decision made by the [SPECIFIC DECISION-MAKER], may within [NUMBER] days of becoming aware of the decision, lodge a written appeal with the [SPECIFIC DECISION-MAKER] requesting him/her to reconsider the decision.

(2) The [SPECIFIC DECISION-MAKER] may upon receiving the written appeal –

(a) confirm, vary or revoke the appealed decision; or

(b) appoint a [NAME OF APPEAL AUTHORITY] to consider the appeal, and that [NAME OF APPEAL AUTHORITY] may, after consideration of the appeal, confirm, vary or revoke the appealed decision.

(3) The decision contemplated in sub-section 2(a) and (b) must be accompanied by reasons for the decision.

4 4 3 Formulation three

1(1) A person who is dissatisfied with a decision taken by the [SPECIFIC DECISION-MAKER], may within [NUMBER] days of being notified of the decision, lodge an application for reconsideration with the [SPECIFIC DECISION-MAKER].

(2) The application for reconsideration must be accompanied by –

(a) reasons for the appeal; and

(b) any other information that might be relevant to the appeal.

(3) The [SPECIFIC DECISION-MAKER] must within [NUMBER] days of receiving the application, confirm, vary or set-aside the decision, and provide reasons for their decision.

(4) A person dissatisfied with the decision contemplated in sub-section (3), may appeal against that decision by lodging an application for reconsideration with the [NAME OF APPEAL AUTHORITY].

(5) The [NAME OF APPEAL AUTHORITY] must within [NUMBER] days of receiving the application contemplated in sub-section (4), confirm, vary or set-aside the appealed decision, and provide reasons for their decision.

5 Final remarks

If one translates the term *Batho Pele*, it means: putting people first. By placing focus on the public administration, its accessibility and transparency, as well as on those living in poverty and within the marginalised sections of society, this thesis sought to do just that. By arguing that the realisation of a uniform system of internal controls could greatly assist in providing access to the justice system, it aimed to put those less fortunate at the centre of its argument. In order for the vision of Transformative Constitutionalism to be realised, all members of the public should be able to access both the justice system, as well as the public administration and succeed in getting both a response and solution to their problems.

A system of internal remedies will ensure the realisation of both objectives of administrative law, namely empowerment and control. Currently, section 7(2) of PAJA only provides for the control component, but not empowerment. Internal remedies can bridge the divide between these two components, ensuring that control is exercised over the public administration, but also enable the public administration to correct its own mistakes without recourse to the courts. Internal remedies are the key to linking justice to administration in the South African context where large parts of society are highly dependent on administrative decision-making in their daily lives, but unable to access the judicial system.

A uniform system of internal remedies will ensure that the public administration functions efficiently, but in an open and transparent manner. Those lacking access to justice, will gain it, and ensure the further realisation of the principles contained in section 33 and 195 of the Constitution, the vision of Transformative Constitutionalism, as well as the ideal of *Batho Pele*.

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